J. O. Reilly

In the Court of Error and Appeal.

THE QUEEN,

(Defendant in Error,)

vs.

PATRICK JAMES WHELAN,

(Plaintiff in Error.)

FROM THE COURT OF QUEEN'S BENCH.

C. ROBINSON, Q.C., and ANDERSON,
For the Crown.

J. HILLYARD CAMERON, Q.C.,
For P. J. Whelan.

Henry Rowsell, Law Printer, Toronto.

1863

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Plaintiff in Error.

v.

THE QUEEN,

Defendant in Error.

THE plaintiff in error was indicted for murder, and convicted at the Autumn Assizes for the County of Carleton, in September, 1868, and judgment of death was passed upon him, to be executed on the 10th of December following. A writ of error, returnable in this Court, was afterwards obtained, upon the fiat of The Honorable John Sandfield Macdonald, Attorney General; to which a return was made.

On the third Monday of Michaelmas Term, under a writ of *Habeas Corpus* directed to the Sheriff of the County of Carleton (*a*), the plaintiff in error was brought into Court in custody of the said Sheriff; and by his counsel, J. H. Cameron, Q.C., prayed oyer of the writ of error and the return thereto, which were read, as follows:

(*a*) The *Habeas Corpus* and return thereto were as follows:—

"Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith:

To the Sheriff of the County of Carleton, and also the keeper of our gaol at Ottawa, in and for our said County of Carleton, greeting:

We command you that you have before our Court of Queen's Bench, at Toronto, immediately after the receipt of this our writ, the body of Patrick James Whelan, detained in our prison under your custody, to undergo and receive all and singular such things as our said Court of Queen's Bench shall then and there consider of concerning him in that behalf, and have you then there this writ.

WRIT OF ERROR.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To our Justices of Oyer and Terminer for our County of Carleton assigned to deliver the Gaol of the said County of the prisoners therein, and also to hear and determine all felonies, trespasses, and other evil doings within the same County, greeting:

Because in the record and proceedings, and also in the giving of judgment, on a certain indictment found against Patrick James Whelan, at a Court of Oyer and Terminer

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"Witness the Honourable William Buell Richards, Chief Justice of our Court of Queen's Bench at Toronto, the eighteenth day of November, in the thirty-second year of our reign.

ROBERT G. DALTON,
C. C. & P.

By Rule of Court.

RETURN.

"I, William Frederick Powell, Sheriff of the County of Carleton, to whom the writ hereunto annexed has been directed, do hereby humbly certify and return to Our Sovereign Lady the Queen, that in obedience to the said writ I have present the body of Patrick James Whelan therein named, as by the said writ I am commanded. And I do further humbly certify and return, that before the coming to me of the said writ, that is to say, on the second day of September, one thousand eight hundred and sixty-eight, the said Patrick James Whelan was committed to my custody by virtue of a certain warrant or order of Court, the tenor of which is as follows:—

"COUNTY OF CARLETON:

"At the General Sessions of the Delivery of the Gaol of Carleton, holden at the City of Ottawa, in and for the said County, on Wednesday, the second day of September, in the year of our Lord one thousand eight hundred and sixty-eight, before The Honorable William Buell Richards, one of the Justices of Our Lady the Queen of her Court of Common Pleas at Toronto, assigned to deliver the said gaol of the prisoners therein being, Patrick James Whelan, convicted of felony, is ordered to be hanged by the neck till he be dead, on the tenth day of December in the aforesaid year.

"By the Court.

"(Signed) J. FRASER,
"*Clerk of Assize.*"

"And these are the causes of the taking and detaining the said Patrick James Whelan, which, together with his body, I have ready, as by the said writ I am commanded.

"(Signed) WILLIAM F. POWELL,
"*Sheriff, County of Carleton.*"

in and for the said County, held at Ottawa, in the said County, on the second day of September, in the thirty-second year of our reign, before The Honorable William Buell Richards, Chief Justice of our Court of Common Pleas, for a certain felony and murder of Thomas D'Arcy McGee, whereof he was indicted, and thereupon by a jury of the said County convicted, as it is said, manifest error hath intervened to the great damage of the said Patrick James Whelan, as by his complaint we are informed; we being willing that the error, if error there be, should in due manner be corrected, and full and speedy justice done to the said Patrick James Whelan in this behalf, do command you that, if judgment be thereupon given, then you send to us, distinctly and openly, under your seal, or the seal of one of you, the record and proceedings aforesaid, with all things concerning the same, with this writ, so that we may have them before our Court of Queen's Bench at Toronto on the third Monday of Michaelmas Term next, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for correcting that error, what of right and according to law ought to be done.

Witness the Honorable William Buell Richards, Chief Justice of our Court of Queen's Bench at Toronto, the sixteenth day of November, in the thirty-second year of our reign.

By the Honorable
John Sandfield Macdonald,
Attorney General of Ontario.

RETURN TO THE WRIT OF ERROR.

The record and proceedings whereof mention is within made appear in a certain schedule to this writ annexed.

Signed and sealed in presence of R. G. Dalton.

The answer of the Justice within named.

(Signed),
Wm. B. Richards, *C.J.* [L.S.]

County of Carleton, } Be it remembered that at a
To wit: } General Session of Oyer and Terminer and General Gaol Delivery, holden at the City of Ottawa, in and for the said County of Carleton, on Wednesday, the second day of September, in the year of our Lord one thousand eight hundred and sixty-eight, in the thirty-second year of the reign of Our Sovereign Lady Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, before the Honorable William Buell Richards, Chief Justice of Her Majesty's Court of Common Pleas for the Province of Ontario, a Justice of our said Lady the Queen duly assigned, and under and by virtue of the Statute in that behalf duly authorized and empowered, to enquire by the oaths of good and lawful men of the said County of Carleton, by whom the truth of the matter may be better known and enquired into, and by other ways, methods, and means, whereby he could or might the better know, as well within liberties as without, more fully the truth of all treason, misprision of treason, insurrections, rebellions, counterfeitings, clippings, washings, false coining, and other falsities of the money of Great Britain and Ireland, and of all other kingdoms and dominions whatsoever, and of all murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings and conventicles, unlawful assemblies, unlawful uttering of words, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligences, concealments, maintenances, oppressions, champerties, deceits, and all other misdeeds, offences and injuries whatsoever, and also the accessories of the same, within the said County of Carleton, by whomsoever and howsoever had, done, perpetrated and committed, and by what person or persons to what person or persons, and when, how, and in what manner, and of all other articles and circumstances whatsoever, any, every, or either of them

concerning; and the treasons and other the premises according to the law and custom of England, and the laws of the said Province, for this time to hear and determine. By the oaths of [mentioning the names of the Grand Jurors sworn, 20 in number], good and lawful men of the County aforesaid, then and there empanelled, sworn and charged to enquire for the said Lady the Queen and for the Jury of the said County, it is presented in manner and form as followeth, that is to say:—

County of Carleton, } The Jurors for our said Lady the
To Wit. } Queen, upon their oaths present that Patrick James Whelan, on the seventh day of April, in the year of our Lord one thousand eight hundred and sixty-eight, at the City of Ottawa, in the County of Carleton, did feloniously, wilfully, and of his malice aforethought, kill and murder one Thomas D'Arcy McGee. Whereupon the Sheriff of the said County of Carleton is commanded that he omit not for any liberty within his bailwick, but cause the said Patrick James Whelan to come and answer, &c. And thereupon, at the same session of Oyer and Terminer and General Gaol Delivery of our said Lady the Queen, holden at the said City of Ottawa, in the said County of Carleton, on the second day of September, in the year of our Lord one thousand eight hundred and sixty-eight, before the said Honourable William Buell Richards, last above named, here cometh the said Patrick James Whelan under the custody of William Frederick Powell, Esquire, Sheriff of the County aforesaid (in whose custody in the gaol of the county aforesaid, for the cause aforesaid, he had been before committed) being brought to the bar here in his proper person by the said Sheriff, by whom he is here also committed, and having heard the said indictment read, and being asked whether he is guilty or not guilty of the premises in the said indictment above charged upon him, he saith that he is not guilty thereof, and therefore he puts himself upon the country. And the Honourable John Sandfield Macdonald, the Attorney General of the

said Province of Ontario, who prosecutes for our said Lady the Queen in this behalf, doth the like. Therefore let a jury thereupon immediately come before the said The Honourable William Buell Richards, last above named, of good and lawful men of the county aforesaid, qualified according to law, by whom the truth of the matter may be better known, and who are not of kin to the said Patrick James Whelan, to recognize upon their oath whether the said Patrick James Whelan be guilty of the felony and murder in the indictment above specified or not guilty, because as well the said Attorney General for the Province of Ontario, who prosecutes for our said Lady the Queen in this behalf, as the said Patrick James Whelan, have put themselves upon that jury. And the said Sheriff for this purpose empanels and returns the persons following, and arranges them in a panel in the order following, that is to say," [setting out the names of all the Petit Jurors returned to the Precept, sixty in number].

"And the said" [setting out the names of the twelve jurors first called], "being severally and successively called come. And the said" [giving the names of six out of the twelve] "are severally and successively peremptorily challenged by the said Patrick James Whelan, and altogether excepted from the said jury. And the said" [giving the names of five out of the twelve first called] "upon the prayer of James O'Reilly, Esquire, one of Her Majesty's Counsel learned in the law, who prosecutes for our Lady the Queen in that behalf, are severally and successively ordered by the Court to stand aside. And the said" [the last of the twelve] "is elected, tried and sworn to speak the truth of and concerning the premises in the said indictment against the said Patrick James Whelan specified."

[The record then set out the names of eleven more of the jurors called, of whom three were challenged peremptorily by the prisoner, three ordered to stand aside for the Crown, aud five sworn. Then the names of six more jurors called, of whom three were peremptorily challenged by the prisoner, two ordered to stand aside for the Crown, and one

sworn. Then the names of five more jurors called, namely, Charles Brunette, Patrick Manion, Jonathan Sparks, William Gamble and Patrick Baxter, of whom three—Brunette, Manion, and Baxter—were ordered, for the Crown, to stand aside; and the record then proceeded to state the challenge of Jonathan Sparks, as follows:—]

"And now, at this day, comes as well our said Lady, the Queen, by Her Attorney General of the Province of Ontario, and the said Patrick James Whelan, in his own proper person, and the jury also come, and thereupon the said Patrick James Whelan challenges Jonathan Sparks, one of the said jurors, because he says that the said Jonathan Sparks is not indifferent between our Sovereign Lady the Queen and him, the said Patrick James Whelan, in that the said Jonathan Sparks has stated and said that if he was on Whelan's jury he would hang him.

And the Queen, by the Attorney General of Ontario, says, that the said Patrick James Whelan is not now entitled to challenge for favor the said juror Jonathan Sparks, in this, that the said Patrick James Whelan has not exhausted his twenty peremptory challenges, only twelve jurors being challenged by him peremptorily.

And the said Patrick James Whelan says that the said answer of the said Attorney General, on behalf of our said Sovereign Lady the Queen, to the said challenge of the said Patrick James Whelan to the said juror Jonathan Sparks, is not sufficient in law. And hereupon it is considered, and adjudged, and ordered, by the Court, that the said Patrick James Whelan is not now entitled to challenge for cause the said Jonathan Sparks, and the said Judgment is delivered by the said learned Chief Justice in writing, as follows:—'I overrule the demurrer. I decide that the prisoner's challenge is good as a peremptory challenge and not as a challenge for cause; and if his peremptory challenges of twenty, including this, are exhausted, I rule this is to be considered as a peremptory challenge, and not for cause.' And thereupon, in deference to the said judgment, the said challenge is accordingly taken and treated by the said

Patrick James Whelan and the said Attorney General as a peremptory challenge for and on behalf of the said Patrick James Whelan, and the said Jonathan Sparks is thereupon not sworn upon the said jury."

[The record then set out that William Gamble, the remaining one of the five last called was sworn: that four more jurors were called, of whom one was ordered for the Crown to stand aside, and three peremptorily challenged by the prisoner: that four more were then called—namely, George Cavanagh, James Tierney, Robert McDaniel, and Benjamin Hodgins; and it proceeded :]

"And the said Patrick James Whelan challenges the said George Cavanagh for cause, and says that the said George Cavanagh is not indifferent between our Lady the Queen and the said Patrick James Whelan. And the Honourable John Sandfield Macdonald, who prosecutes for our Lady the Queen, says, that the said George Cavanagh is indifferent between our said Lady the Queen and the said Patrick James Whelan. And hereupon triers being duly sworn to try the said issue between our Lady the Queen and the said Patrick James Whelan, say that the said George Cavanagh is indifferent between our Lady the Queen and the said Patrick James Whelan. And the said George Cavanagh is hereupon elected, tried and sworn to speak the truth of and concerning the premises in the said indictment against the said Patrick James Whelan specified."

[It then stated that Tierney was set aside for the Crown, and Robert McDaniel sworn; and the challenge of Benjamin Hodgins was then set out thus :]

"And now at this day come as well our Sovereign Lady the Queen, by Her Attorney General of the Province of Ontario, as the said Patrick James Whelan, and the said Patrick James Whelan peremptorily challenges Benjamin Hodgins, one of the jurors empanelled on the said jury, because that the said Patrick James Whelan before his peremptory challenges were exhausted challenged for cause one Jonathan Sparks, one of the said

jury, and the said challenge for cause was not allowed by the said Court, nor was the said challenge for cause tried nor submitted to triers by the said Court, but the said Patrick James Whelan was required to challenge the said Jonathan Sparks peremptorily if he desired to challenge the said Jonathan Sparks as one of the jurors of the said jury, and that the said challenge for cause should be considered as a peremptory challenge and not as a challenge for cause, and the said challenge for cause was accordingly taken and treated as a peremptory challenge, and the said Jonathan Sparks was not thereupon sworn upon the said jury, and this the said Patrick James Whelan is ready to verify.

And Her Majesty, by the Attorney General of Ontario, says, that the said Patrick James Whelan is not entitled, in law, to challenge peremptorily Benjamin Hodgins, one of the jurors empannelled on the said jury, in this, that the said Patrick James Whelan had already exhausted his peremptory challenge of twenty jurors, and the challenge of the juror Jonathan Sparks for favor having been disallowed, he subsequently challenged the said last mentioned juror peremptorily, before the said twenty challenges were exhausted, is not now entitled to challenge peremptorily the said juror, Benjamin Hodgins, after the said twenty jurors have been exhausted, without assigning cause therefor. And hereupon it is considered and adjudged, and ordered by the Court here, that the said Patrick James Whelan is not entitled in law to challenge peremptorily the said Benjamin Hodgins, and the said challenge is disallowed, notwithstanding that the said Patrick James Whelan claims the right to challenge peremptorily the said Benjamin Hodgins. And hereupon the said Benjamin Hodgins is elected, tried, and sworn to speak the truth of and concerning the premises in the said indictment against the said Patrick James Whelan specified."

[Another juror was then stated to have been called and sworn, making up the twelve, and the record proceeded :]

"And the said jurors so elected, tried and sworn to speak

the truth of and concerning the premises in the said indictment against the said Patrick James Whelan specified, to wit:" [Setting out the names of the twelve jurors sworn] "upon their oaths say that the said Patrick James Whelan is guilty of the felony and murder aforesaid on him charged, in the form aforesaid, as by the indictment aforesaid is above supposed against him. And upon this it is forthwith demanded of the said Patrick James Whelan if he hath or knoweth anything to say wherefore the said justice here ought not, upon the premises and verdict aforesaid, to proceed to judgment and execution against him, who nothing further saith except as before. Whereupon, all and singular the premises being seen, and by the said justice here fully understood, it is considered by the Court here, that the said Patrick James Whelan be taken to the Gaol of the said County of Carleton, from whence he came, and from thence to the place of execution, on Thursday the tenth day of December, in the year of our Lord one thousand eight hundred and sixty-eight, between the hours of nine in the morning and four in the afternoon, and there be hanged by the neck until his body be dead."

J. H. Cameron, Q. C., on behalf of the plaintiff in error, craved leave to assign error, which was granted.

The assignment of errors was as follows:

Michaelmas Term, 32 Victoria.

And now on this twenty-third day of November, in this same term, before our said Court of Queen's Bench, cometh the said Patrick James Whelan into the Court here, under the custody of the Sheriff of the County of Carleton, by virtue of a writ of *Habeas Corpus* issued in that behalf, and immediately saith, that in the record and process aforesaid, and also in giving judgment aforesaid, there is manifest error, in this:—

That it is not alleged nor stated in the said record that the said Chief Justice, William Buell Richards, held the said Session of Oyer and Terminer, and General Gaol De-

livery, by virtue of any commission to him, or to him and others, for that purpose granted, or without any commission by the order, command, or direction of the Governor General of the Dominion of Canada, or of the Lieutenant Governor of the Province of Ontario—wherefore in that there is manifest error:

That no jury process is awarded upon the said record, nor could any such process be legally awarded by the said William Buell Richards as such Chief Justice, inasmuch as, for the reason firstly above assigned, he had no jurisdiction or authority to order or award such process, as a justice of Oyer and Terminer and General Gaol Delivery of the said County of Carleton—wherefore in that there is manifest error:

That it appears by the said record that the said Patrick James Whelan challenged Jonathan Sparks, one of the jurors impannelled and returned upon the said jury, for cause of favor, as he had a legal right to do, and that the said challenge was, contrary to law, disallowed by the said Court, on the ground that the said Patrick James Whelan had not, at the time he made such challenge for cause, exhausted the peremptory challenges to which he was by law entitled, and that until he had exhausted his peremptory challenges he could not challenge any juror on the said jury for cause, but only peremptorily—wherefore in that there is manifest error:

That it appears by the said record that the said Patrick James Whelan challenged Benjamin Hodgins, one of the said jurors, peremptorily, as he had a legal right to do, and that the said challenge was, contrary to law, disallowed by the Court, on the ground that the said Patrick James Whelan had already challenged the said Jonathan Sparks, one of the said jurors, for cause; and that at the time the said Patrick James Whelan challenged the said Benjamin Hodgins peremptorily, the said Patrick James Whelan had exhausted his peremptory challenges, as the said Patrick James Whelan had challenged twenty jurors peremptorily, including in the said twenty challenges the chal-

lenge of the said Jonathan Sparks for cause, as a peremptory challenge: whereas the challenge by the said Patrick James Whelan of the said Benjamin Hodgins was the twentieth peremptory challenge of the said Patrick James Whelan; and by the said challenge of the said Benjamin Hodgins not being allowed by the said Court, the said Patrick James Whelan was, contrary to law, deprived of his right to have twenty peremptory challenges on his said trial, and was allowed nineteen peremptory challenges only, against the form of the statute in that behalf—wherefore in that there is manifest error:

And this the said Patrick James Whelan is ready to verify. Wherefore he prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid appearing, may be reversed, annulled, and altogether had for nothing, and that he may be restored to the free law of the land, and all that he hath lost by the occasion of the said judgment:

The Crown immediately joined in error, filing a joinder, as follows:—

On the twenty-third day of November, in the year of our Lord one thousand eight hundred and sixty-eight, in Michaelmas Term, in the thirty-second year of the reign of Queen Victoria:

And the said Honourable John Sandfield MacDonald, Attorney General of our Sovereign Lady the Queen, being present here in Court, and having heard the matters aforesaid above assigned for error, for our said Lady the Queen saith that neither in the record and proceedings, nor in the rendering of the judgment aforesaid, is there any error. Therefore the said Attorney General of our Sovereign Lady the Queen prayeth that the Court of our said Lady the Queen now here may proceed to examine as well the the proceedings aforesaid and the judgment thereon given as aforesaid, as the matters above assigned and alleged for error, and that the judgment may in all things be affirmed.

J. H. Cameron, Q. C., for the plaintiff in error, then prayed for a concilium, which was appointed for Monday the 30th of November then next.

The following rule was drawn up:—

IN THE QUEEN'S BENCH.

Monday, the twenty-third day of November, in the 32nd year of the reign of Queen Victoria.

Patrick James Whelan, the plaintiff in error, being brought here into Court in custody by the Sheriff of the County of Carleton, by virtue of a writ of *Habeas Corpus*, it is ordered that the said writ and the return made thereto be filed. And the said plaintiff in error producing a writ of error, and praying oyer of the record and judgment against him upon an indictment of murder, and the same being read to him, the said plaintiff in error now here in Court assigns error. It is further ordered that the assignment of errors be filed; and the said plaintiff in error is now here in Court committed to the custody of the Sheriff of the County of York, charged with the matters in the sad return mentioned, which matters are as follows, to wit:—that the said Patrick J. Whelan was committed to and detained in the custody of the Sheriff of the said County of Carleton by writ of a certain warrant or order of Court in the words following, that is to say: [Setting out a copy of the order mentioned in the return to the *Habeas Corpus*, *ante*, p. 2, note (*a*).]

To be by the said Sheriff kept in safe custody until he shall be from thence discharged by due course of law. And it is further ordered that the said Sheriff or his deputy do bring the said plaintiff in error before this Court, on Monday, the nineteenth day of November, instant.

On motion of

J. HILLYARD CAMERON, Q. C.

By the Court,

(Signed) ROBERT G. DALTON.

On the 30th November, 1868, the prisoner was brought into Court. Mr. Justice Morrison having been compelled to go to Ottawa, with the Chief Justice of the Common Pleas and Mr. Justice John Wilson, to assist in swearing in Sir John Young as Governor General of Canada, the argument was by consent postponed until Friday then next, the 4th of December, and the following rule was drawn up.

IN THE QUEEN'S BENCH.

Michaelmas Term, 32 Victoria.

PATRICK JAMES WHELAN,
Plaintiff in Error;
v.
THE QUEEN,
Defendant in Error.

The plaintiff in error, Patrick James Whelan, being brought here into Court in custody of the Sheriff of the County of York, by virtue of a rule of this Court, is remanded to the same custody charged with the matters in the said rule mentioned. And it is further ordered that the said Sheriff do bring the said Patrick James Whelan before this Court on Friday next, the fourth day of December next, at noon. And at the request of the said Patrick James Whelan, and his counsel, the argument of this case upon the concilium is postponed until that day.

On motion of
MR. ROBINSON,
By the Court,
(Signed) ROBERT G. DALTON.

On the 4th December the case was argued.

J. H. Cameron, Q. C., for the plaintiff in error.
C. Robinson, Q. C., and *Anderson*, for the Crown.

The plaintiff was remanded until Monday, the 21st December, and on motion of *O'Reilly*, Q. C., for the Crown, the following rule was drawn up:—

IN THE QUEEN'S BENCH.

Michaelmas Term, 32 Victoria.

PATRICK JAMES WHELAN,
Plaintiff in Error,
v.
THE QUEEN,
Defendant in Error.

The plaintiff in error, Patrick James Whelan, being brought here into Court in custody of the Sheriff of the County of York, by virtue of a rule of this Court, is remanded to the same custody, charged with the matters in the said rule mentioned. And it is further ordered that the said Sheriff of the County of York do bring the said Patrick James Whelan before this Court on Monday the twenty-first day of December, 1868.

On the motion of
Mr. O'REILLY,
Counsel for the Queen.

(Signed) ROBERT G. DALTON.

On the 21st December the prisoner was again brought into Court, and, the Court differing in opinion, the following judgments were delivered :—

ADAM WILSON, J.—This case, though founded on the charge of murder, and for the murder of a distinguished person in this country, under circumstances which have given to it great notoriety, is, nevertheless, of no further importance at present than as it affects or is affected by the regularity of criminal proceedings, and the practice and procedure of trial by jury.

Considered in the latter aspect, no subject can be of greater consequence in the administration of justice, and more especially in that part of it by which the life or liberty of the accused is to be determined, than the fair and impartial selection, empanelling, deliberation, and finding, of jurors.

Trial by jury has long been the established forum for the settlement of all controverted rights in the Courts of Common Law.

In criminal and State prosecutions no one has ever questioned its especial fitness both for the prosecutor and the prosecuted; and in times when the power of the Crown and the terror of the Courts were most abused in enforcing jurors, and repeated attempts were made to curtail their power and to destroy their independence, no one, even then, openly denied the sufficiency and excellency of the system.

The great object in every trial is to have it fairly conducted and decided by impartial persons, and for this purpose, in felonies, the prisoner is entitled to challenge the full number of twenty jurors without cause or question, and any greater number beyond the twenty on shewing sufficient cause for their rejection.

By this process of winnowing, it is supposed there will be secured to him as fairly constituted a tribunal as human justice and enlightenment can provide—that is, in the expressive language of the law, "twelve good and lawful men" to whom the prisoner may commit, for good or for ill, his life or liberty.

In is alleged on this record that the prisoner has not been allowed the full exercise of his legal right of challenge to the number of twenty without cause assigned, and that Benjamin Hodgins, who would, as the prisoner alleges, have been the twentieth juror so challenged, was put upon the jury against his consent, and joined in the verdict which was given against him.

The principal question then in this case is whether, from the facts on the record, this allegation is true or untrue.

And this again depends upon the questions, whether the judgment of the Court was correct or incorrect by which the prisoner was prevented from challenging Jonathan Sparks for cause before he had completed his full number of peremptory challenges,—and whether the prisoner, by subsequently challenging this same juror without cause, has or has not waived or lost his right of exception to the decision on the previous challenge for cause.

Before referring to the question of challenge, it will be

better to dispose of the exceptions which apply to the want of a commission to hold the Court at which the conviction took place, and to the alleged want of an award of jury process, and to the jurisdiction of the Judge to award it by reason of his having acted without a commission.

The statement of Hawkins, which is contained in numberless other books and decisions, is, no doubt, well settled law that "the King being the supreme magistrate of the kingdom, and entrusted with the whole executive power of the law, no Court whatever can have any such jurisdiction, unless it some way or other derive it from the Crown."—*Hawk.* P. C., Book 2, chap. 1, sec. 1; and, sec. 9, that "all Judges must derive their authority from the Crown, by some commission warranted by law."

And from this it follows, as all the precedents shew, that the commission should be specially set out under, which the Court was held when the record is made up; and that unless it is so set out the proceedings of the Court will be erroneous, because they would appear to be without jurisdiction.

Whether it was necessary to state on the record that the Court was held by virtue of a commission, or, if there were no commission, that it was so held without a commission by the order or direction of the Governor, must depend upon the effect and construction of our own Statutes.

The law now in force under which the Courts of Assize and *Nisi Prius*, Oyer and Terminer, and Gaol Delivery are held, and under which the Court in question was held is contained in the following provisions.

The Consolidated Statute, U. C., chap. 11, sec. 1, as amended by the 29-30 Vic. chap 40, sec. 3, enacts that these Courts shall be held between stated seasons in the year, "and all such Courts shall be held, with or without commission, as to the Governor may seem best, and on such days as the Chief Justices and Judges of the Superior Courts of Common Law shall respectively name."

Sec. 2. Enacts that "In case commissions be issued, such commissions shall always contain the names of the Chief Justices and Judges aforesaid, one of whom, if any of them be present, shall preside in the said Courts respectively, and such commissions may also contain the names of any of the Judges of the County Courts and any of Her Majesty's Counsel learned in the law of the Upper Canada Bar, one of whom shall preside in the absence of the Chief Justices, and of all the other Judges of the Superior Courts.

Sec. 3. "If no such commission be issued, the said Courts shall be presided over by one of the Chief Justices or Judges of the said Superior Courts." Then provision is made, in case of the absence of the Superior Judges, for one of them appointing a County Court Judge or Queen's Counsel to preside.

Sec. 4 Enacts, that "Each of the said Chief Justices, &c., " presiding at any Court of Assize and Nisi Prius, or of Oyer and Terminer, and General Gaol Delivery, shall possess, exercise and enjoy all and every the like powers and authorities heretofore set forth and granted in commissions issued for holding all or any of the said Courts."

Sec. 5 dispenses with Associate Justices in any commission of Oyer and Terminer and General Goal Delivery, or at any such Court; and sec. 6 reserves the power to the Governor of issuing Special Commissions when he deems it expedient.

The history of Commissions in this Province seems to be as follows:

By the 32 Geo. III. ch. 1, sec. 3, it was declared that after the passing of that Act, "in all matters of controversy relative to property and civil rights, resort shall be had to the laws of England as the rule for the decision of the same."

By the 34 Geo. III. ch. 2, secs. 17, 19, the Governor was empowered to issue Commissions of Assize and Nisi Prius for the trying of all issues joined in the said Court, (*i. e.* the Court of King's Bench, established by that Act

as a court of original jurisdiction with the most plenary powers), in any suit or action arising in any of the districts of the Province.

The 2 Geo. IV. ch. 1, which repealed the last statute, re-enacted it in substance.

By the 7 Wm. IV, ch. 1, sec. 8, this enactment was repealed, and provision was made as before, for Commissions of Assize and Nisi Prius; and the Act further provided: "And in like manner Commissions of Oyer and Terminer and General Gaol Delivery, shall be issued into the several districts of the Province twice in the year within the periods aforesaid."

Until the Act of 1837 there was no statutory provision for holding, or for issuing Commissions for holding, Courts of Oyer and Terminer and Gaol Delivery in this Province. Yet we know that from a period as early as the establishment of the King's Bench, in 1794, down to the passing of the Act of 1837, these criminal Courts were regularly held by Commission from the Crown at the same time and by the same Judges who took the Courts of Assize and Nisi Prius, and that from 1837 until the 18 Vic. ch. 92, these Commissions continued to be issued until they were done away with by the last mentioned Act.

The history of the dispensation of Commissions is as follows:

By the 18 Vic. ch. 92, sec. 43, it was enacted that it should not be necessary to issue any Commissions of Assize, &c., but that the said Courts should be held at such times, &c., and the Judges should preside over them with the same authorities, &c, without the issuing of a Commission for holding the same, as they had been accustomed to exercise under a Commission.

This Statute made no reference as to Commissions issuing or not issuing "as to the Governor may seem best."

By the 19 Vic. ch. 43, sec. 152, these words last referred to were introduced.

And by the 20 Vic. ch. 57, sec. 30, repealing the last mentioned section, these words were still continued, and

they were embodied in the Consol. Stat. U. C., ch. 11, sec. 1, and in the 29-30 Vic. ch. 40, sec. 3, before mentioned.

Conceding, then, that by the common law the Courts of Oyer and Terminer and Gaol Delivery could not have been held without a commission, and that such special authority should always appear of record, the question is, is it necessary, under the provisions of the Statutes which have been referred to, that there should have been a commission, or that it should have appeared whether there was one or was not one, or whether it seemed or did not seem best to the Governor that there should have been, or that there should not have been, a commission.

It is quite plain that these Courts are to be held with a commission or without one, "as to the Governor may seem best."

It is also plain that the same course is to be pursued, so far as the superior Judges are concerned, whether a commission issues or does not issue—that is, one of them is to preside if present; and that the only difference is, that if one of the superior Judges be not present, then, in case of a commission, one of the Judges of the County Court or a Queen's Counsel *named in the Commission* may preside in his stead; and if there be no commission, one of the same class of persons—namely, a County Court Judge or a Queen's Counsel,—*to be appointed by one of the superior Judges*, may preside.

As therefore one of the superior Judges is to preside in these Courts in any event if present, and as they must be named in the commission if there is one, it seems of no kind of consequence, so far as any of them or their powers may be concerned, whether they are acting under a special commission or not.

But it may be necessary, if a County Court Judge or Queen's Counsel has taken the Court, that the roll should shew whether there was or was not a commission, because he is not to be a Judge under all but only under special circumstances—namely, in the absence of all of the

superior Judges ; and upon being named in the commission or specially deputed by a superior Judge to act. The authority of the superior Judges is general, determinate, and irrevocable, by Statute ; the authority of the others is special and contingent.

While therefore the authority of the one class need not appear, the authority of the other must be shewn to justify their assumption and exercise of it.

The practice has been, ever since the Act of 1855 was passed, for the Judges—and notwithstanding the alteration of that Act by the Act of 1856—to proceed without enquiry of there having been any order or direction of the Governor with respect to commissions ; and it has been equally the practice for the Governor to make no order in the matter. It must therefore have been all along assumed that the fact of its having "seemed best to the Governor" *not* to issue a commission, was sufficiently evidenced by the fact of its not appearing that he had in truth made an order respecting it.

This is the construction which must have been put upon the Statute by the Legislature, for the 19 Vic., ch. 43, the Act of 1856, has been altered and re-enacted three different times, and yet the practice has continued the same throughout all these changes.

It may, therefore, be presumed, in so important a matter, that it was with the knowledge and approval of the practice that has been pursued by the executive and judicial authorities under this Statute, that the new legislation was based ; and the reference made by Mr. Robinson to the language of Lord Campbell in *O'Connell* v. *The Queen* (11 Cl. & Fin.) has a direct application to this point.

It appears then to me :—1. That as the Judges appoint the days for holding these Courts ; 2. As they must, commission or no commission, preside in them, if present ; 3. As they have the like powers in the one case as in the other ; 4. As they have the sole power of summoning jurors for such Courts ; and they are to do this "as soon as conveniently may be after the Commission *or other day*

is known," which day they alone can fix—Consol. Stat. U. C. ch. 31, sec. 60; 5. And as the practice has been for the Judges to take these Courts without regard to any order of the Governor, or enquiry whether there was such an order or not; and as the practice has also been for the Governor not to make such an order, and not to issue commissions, all parties conceiving the Statute sufficient for the purpose—that it was not necessary it should have appeared on the record whether the Chief Justice, who held this Court, acted under a commission or without one, or that it should have appeared whether the Governor made an order with respect to a commission for the Court or did not make it.

The record shews the Court was taken by a person competent by Statute to hold it either with or without a commission; and as no special commissio is set out, it must be assumed the Chief Justice was acting under his Statutory authority alone; and as a Judge of Assize, as such, by force of the Statute 27 Edw. I. ch. 3, may deliver gaols without any special commission for that purpose (*Hawk.* P. C. Book II. ch. 7, sec. 5; *Dyer*, 99, pl. 62), the record fully shews the Chief Justice possessed the requisite authority on this occasion.

I think, therefore, the first error which has been assigned fails.

The second error assigned is, that no jury process is awarded on the record. This I take to be a distinct ground of error; but upon referring to the record there seems to be no ground for it. The roll contains the usual award of *venire facias.* The assignment then proceeds: "nor could such process be legally awarded by the said William Buell Richards, as such Chief Justice, inasmuch as, forthe reason firstly above assigned, he had no jurisdiction or authority to order or award such process as a Justice of Oyer and Terminer and General Gaol Delivery."

The disposal of the first exception must dispose of this one also, depending as it does on the alleged want of a special commission.

The award is, that the Chief Justice, after issue joined, directed a jury to come. Now this may well enough be done—according to the authority of *Hawk.* P. C. Book 2, ch. 41, sec. 1; 1 *Chitty*, Cr. Law 146, and *Peter Cook's* case, 13 State trials 327–8,—by the Judge, acting as a Judge of Gaol Delivery.

The reason is, because there has been a previous precept issued for the return of jurors to that Court; but that is the very course prescribed by our Statute to be taken, not only by the Judge of Gaol Delivery, but by the Judge of Oyer and Terminer as well. The jurors then being present, the Judge from among them directs a jury to come or be empanelled for the trial of the particular issue before him.

The Consol. Stat. U. C. ch. 31, sec. 59, provides that, "The Judges, Justices, and others, to whom the holding of any Sittings or Sessions of Assize and Nisi Prius, Oyer and Terminer, Gaol Delivery, Sessions of the Peace, or County Court, by law belongs, or some one or more of such Judges, Justices, or others, shall for that purpose issue precepts to the Sheriff, or other proper officer or minister, for the return of a competent number of Grand Jurors, for cases criminal for such sittings or sessions, and of a competent number of Petit Jurors for the trial of such issues or other matters of fact, in cases criminal and civil, as it may be competent to such petit juries to try at such sittings or sessions according to law."

And by sec. 60, these precepts are to be issued "as soon as conveniently may be after the Commission or other day is known."

The persons to whom the holding of the Sittings of Assize and Nisi Prius, Oyer and Terminer, and General Gaol Delivery, and Sessions of the Peace by law belongs, are the Judges of the Superior Courts of Common Law.

The Chief Justice is and was one of them. He had the power to issue, and it must therefore be assumed he exercised that power and issued, his precept either alone or jointly with his fellows, or that they, or some or one of them did so, for the return of a competent number of jurors for the Court in question.

These jurors when brought there were for the trial of such issues and other matters of fact in cases criminal and civil as it was competent for them by law to try, and the award on the roll is quite consistent with the provision of the Statute, that the Judge of Oyer and Terminer directed a jury to come from among those who had been summoned for the purpose.

But it is said this could only have been done by a Judge acting as a Judge of *Gaol Delivery*, and not as a Judge of Oyer and Terminer, and many authorities were cited on this point. And it was contended, in order to give force to this view, that the record shews the Chief Justice was acting only as a Judge of Oyer and Terminer.

The record shows that the Queen had sent to the Justices of Oyer and Terminer for the county of Carleton, assigned to deliver the Gaol of the county and also to hear and determine, &c., the writ of error which is set out. The writ then follows.

The return to the writ shows that at a General Session of Oyer and Terminer and General Gaol Delivery, held before the Chief Justice duly assigned and under and by virtue of the Statute in that behalf duly authorized and empowered to enquire, hear and determine, &c.,—setting out the Oyer and Terminer authority only, and not an authority for Gaol Delivery —it was presented, &c.

The record then shows throughout that proceedings were had at the same session of Oyer and Terminer and General Gaol Delivery.

I am not satisfied that a full authority does not appear on the record, for Justices of Oyer and Terminer *as such* may be empowered to deliver the gaol, as well as to hear and determine, and if their authority to hear and determine appears, the other powers conferred upon them to deliver the gaol, being made incident to and dependent on their functions as Justices of Oyer and Terminer, may be properly exercised by them in the character of Justices of Oyer and Terminer.

Nor am I satisfied that there is the distinction between

Justices of Oyer and Terminer and Justices of Gaol Delivery, as to their right and power to summon or to empanel a jury to appear instanter out of the general panel returned by the Sheriff.

But, however these two points may be, I am of opinion our Statutes make no difference between these two Courts, and that the one may as freely exercise all the powers and jurisdiction as the other can. See particularly sections 63, 69, 70 and 72, of the Jury Act, Consol. Stat. U. C. ch. 31.

The Chief Justice had therefore ample power, as a Judge of Oyer and Terminer, to call a Jury instanter before him, from the general panel summoned for the occasion, as a Judge of Assize, Nisi Prius, or Gaol Delivery had.

The second ground of error fails also, in my opinion.

The remaining grounds of error relate to the challenge of the jurors.

The third error assigned is, that the prisoner challenged Sparks for cause, which challenge was disallowed by the Court on the ground that the prisoner could not challenge for cause until he had first exhausted his peremptory challenges.

If this were all that was stated there would not have been any improper ruling, for nothing more would appear than that the Judge decided that the peremptory challenge should first be taken and then the challenges for cause; and this might have been a mere rule of practice for the occasion, to avoid confusion, which the Judge, I conceive, had full authority to make and enforce.

Suppose there had been two prisoners for trial. The Judge, I think, might have said to one of them, "You A. B. must challenge first, and you must make your peremptory challenges before you challenge for cause," and then have allowed the other prisoner his challenges in the like order; and this could not have been ground of error.

Brandreth's case, (32 State Trials 771), is I think to this

effect. It relates to the mere order, convenience, and arrangement of making challenges, and it does not profess to lay down the rule that there can be no peremptory challenges unless made before the challenging for cause.

In *Chitty's* Criminal Law, Vol. I. 540, it is said, "After challenging thirty-five jurors in treason, and twenty in felony, peremptorily, the defendant may, for cause shewn, challenge as many jurors as may be called, so as to exhaust one or more panels, if his causes of objection be well founded." But this does not mean that the challenges for cause cannot be made till after the peremptory challenges have been exhausted, for it is directly against the statement on page 545, that, "if a juryman be challenged for cause and pronounced impartial, he may afterwards be challenged peremptorily, for otherwise the very challenge might create in his mind a prejudice against the individual who made the objection."

In *Roscoe's* Criminal Evidence, 9th ed., 206, and *Arch.* Crim. Plg., 16th ed., 149, it is stated also in similar terms as in page 540 of *Chitty's* Criminal Law.

But in none of these is it nor can it be meant that the peremptory challenges, as a rule of law, must be first taken.

None of these writers intended to contradict themselves, or the authority of *Co. Lit.* 158 *a*; *Hawk.* P. C. Book ii. ch. 43. sec. 10; *Com.* Dig. "Challenge" C. 1, or the authority of the numerous cases in which the rule as laid down in these older authors has been constantly followed.

The only two cases I have seen directly in favour of the course which was followed here are *The Commonwealth* v. *Rogers* (7 Metcalf 500) and *The Commonwealth* v. *Webster* (5 Cushing 295).

There must be an order of proceeding observed to insure accuracy and despatch, and if all that was done here had been done with that view no objection could have been made to it.

In *Swan* and *Jeffery's* case, *Foster's* C. L. 106, it is said that one of the prisoners being indicted for petit treason

and the other for murder, the Court decided that if the prisoners did not challenge they might be tried together, but if they did challenge they must be tried separately, for the number of their challenges was different.

This, I apprehend, was said merely to guard against inconvenience.

Some of the instances of taking proceedings in due order may be stated as follows:—

A prisoner must plead in abatement before he pleads in bar. He cannot challenge at all till a full jury appears. He must challenge to the array before he challenges the polls. He must abide by his peremptory challenge when he has made it, and he cannot withdraw it and challenge another juror instead—*Rex* v. *Parry* (7 C. & P. 838). He must shew all his causes of objection before the Crown is called upon to shew cause—*Chitty* Cr. L., Vol. 1, p. 534; *Arch.* Cr. Plg., 16th Ed., p. 146. Whichever party begins to challenge (this is in civil actions, but it would equally apply in criminal cases, as between different prisoners) must finish all his challenges before the other begins—*Co. Lit.* 158 *a*; *Ch. Arch.* Pr., 11th ed., 436. And all challenges of the same kind and degree must be suggested against the juror at the same time—*Co. Lit.* 158 *a*; *Chitty* Cr. L. Vol. I., p. 545.

As this assignment of error does not indicate the real objection, I must refer to the other part of the record to see what it is.

The record states that the prisoner challenged Jonathan Sparks for favor: that the Crown alleged the prisoner was not then entitled to challenge Sparks for favour, as he had not exhausted his twenty peremptory challenges, and that the prisoner demurred to this answer as not sufficient in law; but there is no joinder in demurer. It may not have been necessary (4 Burr. 2085); perhaps it was the Attorney General who should have demurred, as all the facts appeared of record on which the demurrer would have been founded. If his answer can be taken as a demurrer, there may then be a complete, though informal, joinder.

The judgment of the Court was "I over-rule the demurrer. I decide that the prisoner's challenge is good as a peremptory challenge, and not as a challenge for cause; and if his peremptory challenges of twenty, including this, are exhausted, I rule this is to be considered as a peremptory challenge, and not for cause."

As a strict proposition of law, this decision was not, I think, correct, for the prisoner had the right to challenge to the favor before he had made all or any of his peremptory challenges. He had the right to deal with them when and in what manner he pleased, subject only to those necessary and convenient rules for the conduct of business, which the Court might have seen fit to adopt.

If a rule had been made that all peremptory challenges should be first taken, then on Sparks being first called he would not have been challenged peremptorily, but would have gone into the jury box, not however to be sworn, but to abide the result of all the challenges. When the peremptory challenges were through, the prisoner would proceed with his challenges for cause, and then he would except to Sparks on this ground. In this way regularity would have been preserved, and the prisoner would have had all his legal challenges; and so far the Chief Justice had the power to regulate the proceedings; but he had not the right, in any way, to declare that Sparks, who was challenged for cause, should not be so challenged without any trial, or enquiry, and that he should be computed as one of the twenty peremptory challenges, for this was to take the right of challenge from the prisoner and transfer it to the Court, and to deprive him of a strictly legal right without his leave.

The prisoner was thus made to throw away his challenge on Sparks, whom he had the right to exclude without the loss of his peremptory challenge, and to accept of Hodgins, whom he had the right to reject without cause.

If the case rested here I should be bound to say there was error on this record; for if this could be done as to one person it might equally be done as to twenty, and the prisoner would effectually be deprived of the whole of his

peremptory challenges; and such a proposition cannot certainly be maintained.

But the roll shews that "thereupon, in deference to the said judgment, the said challenge is accordingly taken and treated by the said Patrick James Whelan and the said Attorney General as a peremptory challenge for and on behalf of the said Patrick James Whelan, and the said Jonathan Sparks is thereupon not sworn upon the said jury." And the question is, whether—as the prisoner and the Attorney General have both taken and treated this juror, though in deference to the judgment of the Court, as peremptorily challenged, by reason of which he was not sworn on the jury—the prisoner can afterwards be heard to say that the juror shall not be counted as one of the twenty, but that he has still the right to challenge the full complement of twenty without including Sparks as one of them.

When the prisoner was directed to challenge Sparks peremptorily a wrong was done to him. He had the power to object to this, in which case, if Sparks went upon the jury, there would have been a mistrial, and the proceeding would have amounted to error.

But suppose the Crown had ordered the juror to stand by, upon the prisoner refusing to set him aside peremptorily, or suppose the prisoner had challenged the juror for crime, which disqualified him, or on the ground of non-qualification for want of property, and such challenge was improperly over-ruled, and he thereupon challenged the juror for favor, which was allowed,—could a wrong judgment on any of these points, followed by no result prejudicial to the prisoner, have been ground of error? I think not.

If, then, the mere mistaken judgment be not the cause of complaint, what is it the prisoner complains of?

It is that, after challenging Sparks peremptorily, he was not allowed to challenge peremptorily the full number of twenty, excluding Sparks from the number, by reason of which Hodgins was put upon the jury, whom he says he had the right to exclude.

Should Sparks, then, on all the circumstances detailed in the record, have been computed as one of the twenty, or should he not?

If he should there is no error, if he should not there is error.

The ground on which it is said Sparks should be considered as one of the twenty is, that the prisoner must be taken to have challenged the juror voluntarily after the determination of the Court against him, and that it is of no consequence whether he did so in deference to the judgment of the Court, or in obedience to or in acceptance of that judgment—if there be any difference between the one expression and the other.

The answer of the prisoner to that is, that he was not acting voluntarily, but by the pressure of the judgment; and that he should not be held to have waived his right, and that he could not and cannot by law consent to any act to his own prejudice.

The first question, then, is, could he consent to give up this objection, or waive, release, or abandon it?

The general saying is, that a prisoner can consent to nothing. This is stating the case too generally.

He can consent to nothing manifestly irregular, as that his wife should be examined as a witness, or that the witnesses should be examined without being sworn: *Barbat* v. *Allen* (7 Ex. 609); nor that admissions made by his attorney with the opposite attorney out of Court should be read as evidence in the cause—*Regina* v. *Thornhill* (8 C. & P. 575); nor, perhaps, that the evidence of witnesses given on a former trial should be read in place of a new examination of the witness, although the witness was present in Court and was sworn and heard his evidence read over, and the parties were told they were at liberty further to examine and cross-examine him—*Regina* v. *Bertrand* (L. R. 1 P. C. 520); although this course had been adopted in several instances by consent of the prisoner—*Rex* v. *Streek* (2 C. & P. 413); *Rex* v. *Foster* (7 C. & P. 495).

But to say generally that he can consent to nothing is not correct.

If the cause were on the Nisi Prius side of the Court, he might consent to go to trial without a notice of trial, or upon an irregular notice. He might consent to secondary evidence being given, I am disposed to think, although no notice to produce had been served. He might consent to withdraw a plea in abatement. His consent was frequently asked and required when adjournments were made during the trial, or the jury were allowed to separate before verdict. *The Queen* v. *O'Connell* (7 Irish L. Rep. 272, 288, 337, 338) shews how strongly the different Judges relied on the consent and compact of the defendant; and many other cases are to the same effect. So his consent was frequently asked when the jury were discharged because they could not agree, or from some other cause; and he may withdraw his plea of not guilty and plead guilty.

The following cases relate to some of these points: *Edwards'* case (Russ. & Ry. 224); *Chitty* Crim. L. vol i. pp. 629, 630, 436) *Rex* v. *Stokes* (6 C. & P. 151).

In *Regina* v. *Middlemore* (6 Mod. 212), it was consented to by the defendants, who were indicted for a riot, that the prosecutor should pitch upon three or four of them, and proceed only against them, the rest entering into a rule, if they were found guilty, to plead guilty too, and this was said to be done frequently, to prevent the charges of putting them all to plead.

This course would not perhaps be taken now, though it might be done on an indictment for a nuisance to a highway, if the facts shewed it to be a proceeding substantially for the trial of a civil right.

The prisoner might consent to withdraw or release his challenge altogether—Sir Thomas Raym. 473; *Re* v. *Savage* (1 Moo. C. C. 51); *O'Connor's* case (26 State Trials, 1230-31); or to accept the juror on his challenge being overruled; or if, after his challenge was disallowed, the Crown then challenged him, and the prisoner objected to it unless the Crown shewed cause in the first instance,

or he contended the cause shewn by the Crown was insufficient, this in my opinion would be a consenting to the juror as a proper juryman to be admitted to try the cause, or a waiver of all objection to him; and the pri-prisoner could not after that revive his own original exception?

So he might consent that the jury should take with them plans or writings, not under seal, which were given in evidence. *Chitty* Cr. Law, vol I. p. 633-4..

So he may lose an advantage by not taking it in due time. *Regina* v. *Ellis* (Car. & Marsh. 564); *The King* v. *Marsh* (6 A. & E. 236).

It is said, "If one party apprehend the array will be challenged on the ground of relationship between himself and the Sheriff, he may have the process directed to the Coroner, with the consent of the other party; and if the other do not consent, but insists there is no cause for the change of process, he cannot afterwards take advantage of the objection which he has himself alleged to be futile."—*Chitty* Crim. Law, vol. I. p. 539, citing *Bul.* N. P.306; 5 Rep. 36 b, and other cases.

The prisoner had no vested interest in any particular juror—per Lord Campbell, C. J., in *Mansell* v. *The Queen*, (8 E. &. B. 79). The right which the prisoner had was not to select but to reject jurors.—*United States* v. *Marchant* (4 Mason 160).

I am of opinion, on the whole, then, that this was a matter which the prisoner could consent to give np, waive, or release.

But the material and next inquiry is, whether the prisoner did waive his right of complaint—the overruling of his challenge of Sparks for favor—by taking and treating Sparks as a juror challenged peremptorily, in deference to the judgment of the Court.

I may here say I can attach no precise meaning to the expression, "in deference to the judgment of the Court." I cannot say that it implies a declining of the judgment, but a submission to it, more than it does an acceptance of it. The Nisi Prius colloquial term, indefinite though it

be, may have some better understood signification than the words can possibly have when imported into an Error roll : see *Wilkinson* v. *Whalley* (5 M. & G. 590).

What the prisoner did do in fact was to take and treat Sparks as a juror who was peremptorily challenged by him, and to exclude him from the jury.

If he had not done so, Sparks might have been on the jury. By excluding him the prisoner gained an advantage to himself.

The Court determined he was not to be taken off for cause, and the prisoner asserts he was not off peremptorily. Yet he must have been discharged in one of these ways. It is certain he was not removed for favor ; and it is alleged on the record he was removed peremptorily by the prisoner himself.

No direct information is to be had from the English Reports on this question. The authorities applicable to it are those which were cited in the Courts of the United States.

The case of *Stewart* v. *The State* (8 English's Reports, being the thirteenth volume of Arkansas Reports, 720, decided in July, 1853,) is very much in point. There challenges for favor had been disallowed, and the prisoner put to challenge peremptorily, which he did. On Error brought the Court said, p. 742 : "If the party chooses to challenge the juror peremptorily when he is not obliged to do so, he, by the exercise of his own will or caprice, has undertaken to correct the supposed error of the Court, and waived the benefit of the previous exception. Because, if the decision was right, the party excepting could not have been injured by it, if it was wrong he had the benefit of his exception ; but if at the time in doubt whether it be right or wrong, and he prefers to take the chances for an acquittal, and so elects to rid himself of the obnoxious juror by a peremptory challenge, there is no reason for holding that he can avail himself on error of the exception thus abandoned." And after referring to the language of the Court in 4 Denio, 9, below quoted, the con-

clusion is, "Such, we think, is the law applicable to the case now under consideration."

In *Freeman* v. *The People* (4 Denio, 61), in the Supreme Court of the State of New York, decided in 1847, on a precisely similar question, the disallowance of challenges for favor and the jurors being challenged then peremptorily, the Court said: "It is now urged that these exceptions are still open to examination and review in this Court. I think otherwise. The prisoner had the right and the power to use his peremptory challenges as he pleased, and the Court cannot judicially know for what cause or with what design he resorted to them. He was free to use or not to use them, as he thought proper; but having resorted to them they must be followed out to all their legitimate consequences. Had he omitted to make peremptory challenges, his exceptions growing out of the various challenges for cause would have been regularly here for revision; but he chose by his own voluntary act to exclude these jurors, and thus virtually, and, as I think, effectually, blotted out all such errors, if any, as had previously occurred in regard to them. But the case of the juror Beach stands on other grounds. He was first challenged for principal cause, which, after evidence had been given, was overruled by the Court. He was then challenged for favor, but the triers found him to be indifferent. No peremptory challenge was made, and he served as one of the jury. As to this juror, every exception taken by the prisoner's counsel is now here for examination and review." See also *The People* v. *Bodine* (1 Denio, 281).

In some cases the disallowance of a challenge for cause was held to be waived by a peremptory challenge of the same juror, if the prisoner had not exhausted all his peremptory challenges when a full jury was formed, as in *McGowan* v. *The State* (9 Yerger 184, Tennessee, decided in 1836), *Carroll* v. *The State* (3 Humphrey 315, Tennessee, decided in 1842).

In other cases the fact of the prisoner not having ex-

hausted all his peremptory challenges has been held to make no difference, and the exception has still been open to him on error—*Lithgow* v. *The Commonwealth* (2 Virginia cases, 297-307, decided in 1822), *Sprouce* v. *The Commonwealth* (*Ibid.* 375), *Dowdy* v. *The Commonwealth* (9 Grattan, 732-7, Virginia, 1852).

The reasoning in *Lithgow's* case was put very strongly in support of the prisoner's contention. The Court said, p. 307, "If it was an error, under the circumstances stated, to overrule the challenge for cause, this Court is of opinion that the subsequent exclusion of Irvine does not cure it, although the record shews that the prisoner had not exhausted his peremptory challenges, even when a jury was finally obtained. To procure the reversal of a judgment of conviction, for an error in point of law, it is not required that a prisoner should shew that he was actually injured by it. It will be enough if the Court can be satisfied that he might have been injured. But this Court do perceive at least, by connecting the first and second bills of exception, how this error, if it be one, might have operated to the prejudice of the accused. He might thereby have been prevented from exercising to its utmost extenhis right of peremptory challenge, as a vain and useless thing. He might have thought it better after that decision to take the first jurors that offered, rather than to excite suspicion against himself by challenging as many as the law allowed, when he had reason to believe that after all persons in the same situation with Irvine would compose his triers; and he might have been thereby deterred, and probably was deterred, from making similar objections to others of the venire. If, then, upon the case presented by the record, this Court shall decide that the objection to Irvine ought to have been sustained, the judgment against the prisoner must be reversed, and a new trial awarded."

It was argued in *Vicars* v. *Langham* (Hob. 235) that after praying a tales the party had waived his right of challenge to the array; but it was answered there was no waiver, as there could be no challenge to the array till a

full jury appeared, and a tales was necessary to form a full jury.

If the party challenge *proper defectum*, as for want of property qualification, and that be overruled, he may challenge for favor—21 *Vin.* Abr. 274, pl. 3, 4.

There is very great force in both views of considering the question; for the Crown it may be said, the prisoner was not bound to challenge peremptorily, and by doing so he did gain some benefit, for he excluded the juror from the panel; and instead of relying on his exception, he chose to go to trial and run the chance of an acquittal. By challenging peremptorily he may, too, have put the Crown Counsel off his guard, for if, instead of challenging peremptorily, he had refused to exercise this right because he did not intend to accept the judgment of the Court, the Crown Counsel might have put the juror by to have avoided the difficulty. And this point is one which is suggested on the record; for after the disallowance of the challenge for cause, and after the ruling that the challenge of Sparks was to be considered as a peremptory challenge, it is said "and thereupon, in deference to the said judgment, the said challenge is accordingly taken and treated by the prisoner *and the Attorney General* as a peremptory challenge for and on behalf of the prisoner, and the said Sparks is thereupon not sworn on the said jury."

For the prisoner it may be said that a wrong was done to the prisoner by the judgment pronounced, and which was not one of mere convenience or practice as to proceeding a particular manner and in a certain special order, but it was a decision that the challenge for favor, which might have been admitted as sufficient or which if tried might have been found to have been sufficient, should not be allowed at all, but should be taken and counted only as a peremptory challenge, by reason of which he was made to forfeit one of his peremptory challenges. The overruling of this exception may have prevented or deterred the prisoner from challenging for cause the other four jurors who were still required to complete the panel after Sparks was called.

It must be taken that the prisoner did not accept of this judgment, but that he submitted to it as a matter he could no longer dispute at that time.

If this course can be pursued, and is to be maintained, the prisoner may be deprived of every one of his peremptory challenges, as well as of one of them.

That the extravagance and danger of such a proceeding shew it cannot be law; and as the question is not one of degree but of principle, the rule is as applicable to the deprivation of the prisoner of one of his challenges as of all twenty of them. That the prisoner cannot be concluded from excepting to the disallowance of his challenges, even although the Crown may have lost the opportunity of setting the juror aside, in case the prisoner had refused to challenge him peremptorily, for the Crown created the difficulty, and might have obviated it, even after the judgment, by having the juror stand aside, irrespective of the prisoner declining to challenge him, and it was as much or more the business of the Crown counsel to have done this, if he desired to remove the difficulty, as it was of the prisoner.

And that the judgment with respect to Jonathan Sparks must be presumed to have been an injury to the prisoner by deterring him from exercising his rights against the other jurors called, although he did not challenge them, and although no apparent result or injury followed. It is an injury in contemplation of law, the extent or effect of which is not enquirable into.

I do not doubt that the decision that Sparks should be peremptorily challenged was a wrong done to the prisoner, but whether it would be productive of injury to him or not would depend on circumstances. I do not think it is so necessarily in law. It would not have been an injury to him if he declined to challenge Sparks peremptorily, and the Crown thereupon set the juror aside, for the juror would have been excluded, which was the principal object the prisoner had, and excluded without the prisoner losing any challenge or right.

And it would not have been an injury to him, if after the

decision he voluntarily, and not out of mere deference to the Court,—whatever that may mean,—accepted the juror or assented to challenge him peremptorily.

And I think it would not have been an injury to him, if, on his refusing to challenge peremptorily, and on the challenge of the Crown, he opposed the Crown challenge Nor do I think it would have been an injury to him if he had still had peremptory challenges remaining to him after having been deprived of the challenge as to Sparks.

I do not think the mere erroneous decision was incurable, or that the effect of it could not have been accepted, waived, or released.

If it were attended with no result, as the loss of a challenge or some such damage, I do not think it would remain open for ever to the party as a ground of error.

If, for instance, the challenge had been for want of property qualification, and the challenge had been wrongly disallowed, and the prisoner then challenged the juror for cause, which was allowed, it cannot be conceived that after a trial and conviction the whole proceeding could have been reversed for the erroneous decision as to the qualification, attended, as it would have been, with no result, wrong, or injury.

I do not think it is to be presumed that the prisoner was deterred from making other challenges for cause in consequence of this decision, or that he had such other challenges to make, there being no such evidence on the record of such a fact. If he had other challenges to the favour to make, he should have made them, and have had them and their disallowance entered of record, and then the Court would have seen what wrong he had suffered; but such matters should not be left to conjecture or suggestion.

Suppose, for instance, there had been two indictments against the prisoner, and in one of them such a decision as the present one had been made, could it have been alleged as error in the second case that the prisoner was deterred from making his lawful challenges by reason of the wrongful ruling in the first case, and must it be assumed that

he had such challenge to make in the second case? I think not.

The prisoner would be obliged, notwithstanding the special ruling in the first case, to renew his exceptions in the second case, and so I think Whelan should have done with respect to each particular juror in this case, in order to establish a cause of error or ground of complaint with respect to those jurors who were called after Sparks,—*Mansell* v. *The Queen* (8 E. & B. 57, 58, 59, 60, 61, 62).

I am not inclined to adopt the reasoning in *Lithgow's* case to the extent to which it is urged, for I see it leads into too wide a field of conjecture, which cannot be safely pursued in discussing questions of law in a Court of Error, and when it is considered that what may be done for the prisoner upon conviction, must equally be done for the Crown on an acquittal.

I am not of opinion either that the mere fact of challenging without cause, when the Court had ruled against his challenge for cause, was an abandonment by the prisoner of his right of complaint for the improper disallowance of his first challenge. I think it remained still open to him to review the decision in Error, as it would have been manifestly his right to have done if his whole twenty challenges had been involved in the decision. This whole matter appears of record, and as I think rightly appears there, and it is just as much a subject of appeal as a plea in abatement over-ruled, would have been although the prisoner afterwards pleaded over in bar—*O'Brien* v. *The Queen* (2 H. L. Cas. 465; *O'Connell* v. *The Queen* (7 Ir. L. R. 266; 11 Cl. & F. 155). So a challenge to the array over-ruled would also be a ground of error, if the party did not afterwards challenge the polls—*O'Connell* v. *The Queen* (11 Cl. & F. 155); and I think it would be equally open to an appeal although he did challenge the polls. See *Freeman* v. *The People* (4 Denio 9).

I think, therefore, the challenge of Sparks for favor was still a ground of error, although the prisoner did afterwards challenge him peremptorily; and therefore I do not quite agree with the decisions in 8 English's Re-

ports, and in 4 Denio, above mentioned, as they force the argument to the extreme length, that to save the prisoner's rights he must put himself solely upon the validity or invalidity of the judgment pronounced against him, which is to make the prisoner submit, it may be, to a partial or corrupt jury, and then to make his life depend upon the sufficiency or insufficiency of his peremptory challenge.

But then it must appear that the prisoner was still relying on his rights, by protest or otherwise. At any rate it must not appear that he had waived or compromised them. Whether the allegation that the prisoner had taken and treated the juror as challenged peremptorily by him, and on his own behalf, shews the prisoner did waive his rights, may admit of some doubt; but I am inclined to think it does. In such a case there should be no doubt what the conduct and intention of the prisoner are. There should be no submission in deference to the judgment of the Court, nor should there be any taking and treating of the juror as one who has been peremptorily challenged, when it is not meant that he should be so taken and treated.

There should be a plain enunciation that what the prisoner does is not only not done with his consent, but is done expressly against it, and in full reliance on his rights of disputing and contesting the judgment which he temporarily submits to. Then the Crown is fully informed and warned of the nature and effect of the prisoner's proceedings, and is enabled to determine how far and in what manner to meet them, or to obviate their adverse operation.

The contrast between the procedure of the prisoner in this case and of the prisoner Mansell, in 8 E. & B. 62, in this respect, is very great. There Mansell, by his counsel, "protesting that the said jury has been elected contrary to the laws of this realm, and that, in default of our Lady the Queen assigning good cause of challenge against the said W. Iremonger, the said Jabez Philpott, and the said several other persons so ordered to stand by as aforesaid, the said jury ought not to be so sworn as aforesaid." So that there was no misapprehending what it was Mansell was doing, and meant to do.

But in the present case there is even more than this which was calculated to mislead the Crown as to any reservation by Whelan of the right to contest the challenge which had been disallowed, for it is stated not only that he himself took and treated this juror as challenged peremptorily by himself, but that he and the Attorney General both did so, and the juror was not thereupon sworn upon the jury. This shews a stronger acquiesence in and adoption of the judgment than if the statement had been that the prisoner had alone done so; and it certainly constitutes a waiver, for the reasons before given. The Attorney General had clearly no right nor opportunity after that to challenge the juror, as he might have done if the prisoner had declined to do so in pursuance of the judgment of the Court.

It cannot be said that this is an improper conjecture as to what the Crown might have done—for the turn of the Crown to challenge had not then arrived; and there is a difference between what the prisoner should have done, with an opportunity of doing it, and what the Crown might have done without the opportunity of doing it.

This kind of co-operative proceeding between the Attorney General and the prisoner, does not seem to me to be such a proceeding which remained longer open for question with respect to the juror Jonathan Sparks.

That injustice has in fact been done cannot be, and has not been, suggested; and if a wrong in mere contemplation of law has been done to the prisoner, it is chargeable upon himself, from the course which he has pursued, and not upon the Crown. And I must add that I cannot consider without alarm the idea of a prisoner who has been acquitted being subjected to a second trial because a challenge for the Crown had been erroneously overruled, when the counsel for the Crown and the prisoner had both taken the juror as challenged peremptorily by the Crown. Yet the same measure of justice must be meted out against the prisoner on behalf of the Crown, as against the Crown on behalf of the prisoner.

In my opinion, upon a consideration of all the facts of

the case, the prisoner has waived and lost his right of appeal against the decision of the Chief Justice in respect of the juror whose challenge was overruled; and therefore the ground thirdly assigned for error fails.

The fourth assignment, depending as it does wholly on the third cause, the two together forming the complete ground of error, falls, necessarily, with the third ground.

Upon the whole record, therefore, I am of opinion there is no error, and that judgment should be given for the Crown.

MORRISON, J.—I have the misfortune to entertain a different opinion from that held by the other members of the Court upon one of the principal questions arising in this case, and it is with great respect and diffidence that I venture to dissent from their judgment. As the conclusion I have arrived at cannot affect the decision of the Court, I should have preferred merely stating my dissent, were it not that in a matter of this nature the prisoner as well as the Crown are entitled to know the grounds upon which I rest my judgment.

With regard to the first two grounds of error assigned—namely, that it does not appear on the record that the learned Chief Justice held the session of Oyer and Terminer and General Gaol Delivery, &c., by virtue of any Commission, &c., and that no jury process is awarded, or could be legally awarded, &c.—I do not think it necessary that I should add anything to what has already been said by my brother Wilson, and what I am aware will be expressed by the learned Chief Justice, but to say that I entirely concur in their judgments in that respect.

Then, as to the last two grounds of error assigned, and the questions arising out of them, and upon which I am obliged to differ, I shall first briefly refer to the facts set out in the record.

It appears from the record that after seven jurors had been elected and sworn, twelve having been previously peremptorily challenged by the prisoner and thirteen

ordered to stand aside by the Crown, Jonathan Sparks was called. The prisoner challenged this juror for cause, alleging that Sparks had said that if he were on the prisoner's jury he would hang him; to which the Crown objected, that the prisoner was not entitled to challenge for favour, as he, the prisoner, had not exhausted his twenty peremptory challanges, only twelve then being so challenged by him. To this the prisoner demurred. The demurrer was argued, and the learned Chief Justice gave judgment, deciding that the prisoner was not then entitled to challenge the juror Sparks for cause, stating that the prisoner's challenge was good as a peremptory challenge, and not as a challenge for cause, and that if the prisoner's peremptory challenges of twenty, including the juror Sparks, were exhausted, the challenge to Sparks was to be considered as a peremptory challenge, and not for cause; and the record proceeds with this statement, "and thereupon, in deference to the said judgment, the said challenge is accordingly taken and treated by the said Patrick James Whelan and the said Attorney General as a peremptory challenge for and on behalf of the said Patrick James Whelan, and the said Jonathan Sparks is thereupon not sworn upon the said jury."

What the parties meant by this latter statement did not appear very clear to me on the argument. I can only take it as meaning this:—that as the learned Chief Justice by his ruling deprived the prisoner of the means of shewing the indifference of Sparks on his challenge for cause, the prisoner was compelled either to permit Sparks to be sworn on the jury, or to exclude him by using one of his peremptory challenges, and that the prisoner chose the latter course.

The fourth ground of error is only important as being involved in the third, and as depending upon the correctness of the ruling of the Chief Justice upon the challenge to the juror Sparks. It appears that Hodgins, a juror, on being called was peremptorily challenged by the prisoner. The Crown thereupon objected, and contended that, in-

cluding Sparks, the prisoner had then exhausted his twenty peremptory challenges. The prisoner claimed his right to challenge Hodgins peremptorily, as he had, according to his contention, in effect only challenged nineteen. The Court overruled the challenge, holding that, including the peremptory challenge of Sparks, the prisoner had exhausted his peremptory challenges; and Hodgins was sworn on the jury.

The law has ever had a watchful eye to the pure and impartial administration of criminal justice. Every safeguard has been thrown around that one best guarantee of our liberties, trial by jury, and it is of pre-eminent importance that this portion of the machinery of our judicial tribunals should be maintained in its integrity, and that we should, under no circumstances, by a departure from the due course of procedure, restrict or abridge those rights which were given to secure protection to the fair administration of our criminal law. The common law of England, and the statute law from the earliest period of our national history, gave to prisoners, for the purpose of securing to them impartial juries, various rights of challenge, in certain cases, to the whole panel or array, and also challenges for cause to individual jurors, "without stint." In addition to all this a prisoner was allowed, *in favorem vitæ*, an arbitrary and capricious species of challenge, called a peremptory challenge, to a definite number of jurors at his mere will and pleasure, and upon his own dislike, and without shewing any cause at all, and which right was limited by the Statute 32 Henry VIII. chap. 14, to twenty in felony: "A provision" (as Blackstone says, in his Commentaries, Vol. IV. p. 353) "full of that tenderness and humanity to prisoners for which our English laws are justly famous. This," he says, "is grounded on two reasons. 1. As every one must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him;

the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shewn, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside."

Under our jury laws, in cases of murder and felony, the number of peremptory challenges is limited to twenty, as in the Statute of Henry VIII. Before that Statute, at common law a prisoner could have challenged thirty-five in all cases peremptorily, which number in cases of treason he is still entitled to challenge.

Such being the law, at what time and in what order is a prisoner to make challenge peremptorily and for cause? The highest authorities, such as Coke, Blackstone, and others, and the practice in numerous cases, shew clearly to my mind, irrespective of the reason of the thing itself, that a prisoner is entitled to challenge for cause any juror who may appear at any time before a full jury is sworn, and either before or after the prisoner has exhausted any or all of his peremptory challenges. It is unnecessary for me to refer to authorities. Many were cited in the argument, and the quotation I have already made from Blackstone indicates the law and the practice, and the reason for it.

I must, therefore, with the utmost respect, say that in my opinion the learned Chief Justice erred in giving effect to the objection taken by the Crown against the prisoner's challenge for cause to the juror Sparks.

The next question to be considered is, whether the matters spread out on this record are subjects properly examinable in error. I confess at first I had some difficulty in arriving at a satisfactory conclusion on this point; but after an examination of the authorities to which we were referred, and some others I had occasion to look at, it seemed to me that were the prisoner debarred the right of having

these matters reviewed in a proceeding of this nature, he would be without remedy.

In the case of *Mansell* v. *The Queen*, (8 E. & B. 84), in the Exchequer Chamber, in error from the Queen's Bench, where the matters assigned as error also arose out of challenges to jurors, and which were over-ruled at the trial, not on demurrer, but merely after debate, nevertheless they appeared on the record. The Judges who heard the case in the Exchequer Chambers expressed great doubts that the questions so raised and the errors so assigned were properly on the record and examinable in error. No judgment was however given on that point, as the Court was in a position to decide the case on the merits: but I take from what fell from Willes, J., and Baron Watson, that if the case had been one in which the points raised had been overruled on demurrer error would lie.

Gray v. *The Queen*, in the House of Lords, (11 C. & F. 427), and *Rex* v. *City of Worcester*, (Skinner 101), were referred to, and I further note that Welsby, who was for the Crown, conceded, *arguendo*, that if a challenge made without cause is demurred to, or if there is a counter plea, the decision is one on which error may be brought.

I am therefore of opinion that the grounds taken here are properly the subject of error.

The next question that presents itself is, whether the prisoner, by exercising his right in peremptorily challenging Sparks under the circumstances noted on this record, and excluding the juror from the panel, has waived the effect of the erroneous ruling, and by electing to take that step he has disenabled himself after trial from taking advantage of the error complained of.

After carefully considering all the cases cited to us, and others to which my attention was directed, I have failed to find authority to guide me to a satisfactory conclusion one way or the other; and upon this part of the case, as my opinion is in conflict with the majority of the Court, I express it with a good deal of hesitation.

We were referred on the argument, by the counsel on

both sides, to a number of reported decisions in the Courts of the United States, where questions of a very similar character are discussed, reviewed, and judicially decided. In the neighbouring republic a greater latitude and facility is allowed to prisoners by the laws of the various States than in England or in this country, enabling prisoners there to bring under review in the Courts of the United States exceptions by way of error and appeal; and this may account in a great measure for our finding in their reports so many cases of a like character to the one before us. But these decisions are not uniform or consistent, either with respect to the practice in such cases or the principles upon which they are decided; and although such decisions are not authoritatively binding on us, yet being the judgment of able and learned Judges, expounding laws based on principles derived from our own as well as the decisions of English Courts, they are entitled to every respect and great weight, and I have found them on many occasions very instructive and valuable. But, unfortunately, the decisions cited to us as applicable to the question under discussion, are, as I have remarked, not uniform, but very diverse.

In the case of *The People* v. *Bodine*, in the Supreme Court of the State of New York, (1 Denio, 310), the Court said: "In no case is the prisoner bound to resort to his right to make peremptory challenges. It is armour which he may wear or decline at his pleasure. It is for his own exclusive consideration and decision, and the Court has no right to interfere with his determination. Nor should the prisoner's refusal to make use of her peremptory challenges, as she might have done, preclude her from raising objections to what was done by the Judge; and if, in truth, errors were committed, I do not see that it is less our duty to correct them, than it would have been if the prisoner had exhausted her peremptory challenges. The use or disuse of that right I regard as a fact wholly immaterial to the question now before the Court, and one which cannot rightfully exert the slightest influence upon the decision to be made."

While in the case of *Freeman* v. *The People*, (4 Denio, 31), the Court said: "It is now urged that these exceptions are still open to examination and review in this Court. I think otherwise. The prisoner had the power and the right to use his peremptory challenges as he pleased, and the Court cannot judicially know for what cause or with what design he resorted to them. He was free to use or not use them, as he thought proper; but having resorted to them they must be followed out to all their legitimate consequences. Had he omitted to make his peremptory challenges, his exceptions growing out of the various challenges for cause would have been regularly here for revision. But he chose by his own voluntary act to exclude those jurors, and thus virtually, and, as I think, effectually blotted out all such errors, if any, as had previously occurred in regard to them."

Again, in the case of *Dowdy* v. *The Commonwealth*, in the Court of Appeals of Virginia, (9 Grattan, 737), the Court decided, as in *Lithgow's* case, (2 Virginia Cases, 297), that if the Court erroneously over-rule a prisoner's challenge to a juror for favor, and then the prisoner peremptorily challenges the juror, the error of the Court is not cured by the subsequent exclusion of the juror, although the prisoner had not exhausted his peremptory challenges even to the last.

In the case of *McGowan* v. *The State of Tennessee* (9 Yerger's Reports, 184), the Court held that the statement did not shew that the prisoner had exhausted his peremptory challenges, and if he did not, and he elected a jury *omni exceptione majores*, leaving the peremptory challenges unexhausted, they were of opinion that it did not constitute an error for which they ought to reverse the judgment. And the case of *Stewart* v. *The State* (13 Arkansas, and 8 English's, Reports, 720), was decided in accordance with the case in 9 Yerger; the case of *Bodine* was also referred to. In that case the prisoner complained that he was compelled to exhaust three of his peremptory challenges by the erroneous ruling of the Court; and it is held that if a prisoner challenge a juror when he is not

obliged to do so, he waives his exception, and cannot avail himself in error of the exception then abandoned, and this although he may exhaust his peremptory challenges.

Such are the results of the principal decisions in the United States Courts ; and after the most anxious and the best consideration I have been able to give to the subject, I cannot arrive at the conclusion that the course adopted by the prisoner was, on his part, either a waiver or abandonment of his right now to except to and complain of the ruling of the learned Chief Justice.

It would be, in my judgment, contrary to the whole spirit of our criminal law to hold that when a prisoner is compelled, on his trial for a capital felony, to submit to the ruling of a Judge, and the denial of a right in a matter of vital importance, and when, in order to avoid the immediate consequence of the erroneous judgment, he resorts to the use of another right given to him by the humanity of our law in *favorem vitæ*, a right to be retained by the prisoner in anticipation and used by him at his will, if circumstances should arise to provoke its exercise—I say I cannot assent to holding in such a case that the prisoner should be considered to have waived the wrong to which he excepted and had thus to submit to and avoid. A *multo fortiori* when the consequential operation of the erroneous ruling in effect deprived him of the right of excluding another juror whom the prisoner challenged, and who was sworn on his jury. In my opinion his submission to the ruling of the Court as it appears on the record was done *salvo jure*, and that it is open to the prisoner to urge the exception he has taken with a view to a *venire de novo*.

It was very ably and ingeniously argued that the course adopted by the prisoner was solely one of his own choice and selection, and that by the step he took he effected what he desired to do by his challenges to the favor, namely, the exclusion of the juror Sparks from the jury ; and that by resorting to his peremptory challenge he was not in any wise prejudiced by the erroneous ruling ; and that he is now esstopped, or ought not to be permitted to complain after so

electing and taking the chances of an acquittal by a jury composed of jurors each of whom stood *omni exceptione major*.

But in my judgment the question is not one whether the prisoner was actually prejudiced at his trial. If that were the ground on which we were called on to decide, there would be only one opinion, and that no injury resulted to the prisoner by the ruling of the learned Chief Justice, or the course adopted by the prisoner ; nor was it suggested on the argument that there was any, the slightest ground to doubt that the prisoner had not an impartial jury and a fair trial, aided as he was by the ablest counsel at the bar. On that score we are relieved from any anxiety. The question is one of strict legal right. It is not for this Court to conjecture what effect, if any, the overruling of the prisoner's challenge for favor to Sparks had on either the composition of the jury or the trial itself, for the question is not the fairness of the trial, but whether the prisoner was deprived of an important right which he invoked, and to which he was legally entitled ; and if there is any right more important than another on a trial to a prisoner on his life or death, it is the right to exclude from his jury any juror who is not indifferent, and against whom he is able to show good cause, or the right to set aside any one against whom he has conceived a dislike.

I cannot concur in the view pressed on us by Mr. Robinson for the Crown : that if the prisoner had declined to challenge Sparks peremptorily, and that juror was sworn on the jury, the prisoner would have been entitled in that case to take advantage of the incorrect ruling of the Judge ; but that having chosen by his own voluntary act to exclude Sparks, he did, as said in the case of *Freeman* v. *The People*, reported in 4 Denio, virtually and effectually blot out the error that occurred in respect to that juror: that having resorted to the use of his peremptory challenge, the consequence of that act must be followed to all its legitimate consequences. I cannot see the force of this reasoning. If the prisoner, submitting to the erroneous decision, declined to

peremptorily challenge Sparks, it might have been argued, and I think with much force, that the prisoner acquiesced in the juror being elected and sworn, and that the maxim *qui non prohibet quod prohibere potest assentire videtur* might be invoked against him, as having the power to exclude Sparks he did not use it.

I cannot see the distinction between what was pressed on us during the argument as indicating, in this case, on the part of the prisoner, a waiver or election, and what I understand as being meant by consenting; and in the absence of authority which I would be bound to follow, I am not disposed to do anything that may disturb, or narrow, or fine away that well-known principle in our criminal law, and which is referred to by Sir John Coleridge in giving judgment in the Privy Council, in *Regina* v. *Bertrand* (L. R., 1 P. C. 534), as "the wisdom of the common understanding in the profession, that a prisoner can consent to nothing."

I am therefore of opinion that, as it appears that the prisoner, through the erroneous judgment of the Court, was deprived of his right of challenge for favor to and of proving the alleged unindifference of the juror Sparks, and that in consequence thereof, and in order to avoid the effect of the improper ruling, the prisoner had to resort to a peremptory challenge to exclude Sparks from his jury, and so *pro tanto* diminishing his peremptory challenges, and as he was afterwards disallowed his premptory challenge to the juror Hodgins, on account of the juror Sparks being so excluded, that the prisoner is entitled to our judgment, and that a *venire de novo* should be awarded.

Richards, C. J.—As to the two first grounds of error assigned on behalf of the prisoner:

That it is not alleged on the record that the presiding Judge held the said session of Oyer and Terminer and General Gaol Delivery by virtue of any commission to him, or to him and others, granted for that purpose, or without any commission by the order, command or direc-

tion of the Governor General of the Dominion of Canada, or of the Lieutenant Governor of the Province of Ontario.

Under the Provincial Statute of Upper Canada, 2 Geo. IV. ch. 1, sec. 27, it was provided that it should and might be lawful for the Governor to issue yearly and every year in the vacation between Michaelmas and Trinity Terms, such commissions of Assize and Nisi Prius into the several districts, as might be necessary for trying all issues joined in the court in any suit or action arising in the said districts respectively, and when suitable communication by land should be opened, as the circumstances of the Province might require, likewise to issue such commissions in the vacation between Hilary and Easter Terms.

This section was repealed by the same Parliament, by 7 Wm. IV. ch. 1, sec. 8, which provides in similar language for the issue of Commissions of Assize and Nisi Prius unto the several districts of the Province in the vacation between Easter and Trinity Terms, and between Michaelmas and Hilary Terms. The section then proceeds : "And that in like manner Commissions of Oyer and Terminer and General Gaol Delivery shall be issued unto the several districts of this Province twice in the year, within the periods aforesaid." There is also a proviso to the section authorizing the Governor to issue a Special Commission, or Special Commissions, for the trial of one or more offender or offenders, upon extraordinary occasions, when he shall deem it requisite or expedient so to do.

By Statute of Canada, 8 Vic. ch. 14, sec. 1, it was provided that it should not be necessary for the Governor to issue Commissions of Assize and Nisi Prius, Oyer and Terminer, and General Gaol Delivery, more than once in the year into certain districts therein named. This section was repealed by the Statute of Canada, 12 Vic. ch. 63, sec. 18, sec. 20 of which in effect re-enacted the same provisions as are contained in 7 Wm. IV. ch. 1, sec. 8, except the commissions were to issue in the vacation between Hilary and Easter and Trinity and Michaelmas Terms.

By Statute of Canada 18 Vic. ch. 93, sec. 43, it was

provided that "it shall not be necessary to issue any Commission of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery for any county or place in Upper Canada, but the said Court shall be held at such times as the Judges of the superior Courts of Common Law shall appoint subsequent to the several terms after which they are now directed by law to be holden. * * * And the Judges of the several superior Courts of Common Law in Upper Canada shall and may preside over the Courts of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery, in the same manner and with the same authorities and powers, without the issuing of any commission or commissions for the holding of the said Courts, as they have been accustomed to do under Commission before the passing of this Act." Then a proviso similar to that referred to in the other statutes, authorizing the issuing any special Commission for the trial of offenders, in the same manner and with the same authorities and powers as if that section of the Act had not been passed.

The next section refers to the sending to the Judges of the superior Courts of common law the names of those who shall be associated with the Judges of the said Courts as *Justices of the said Courts of Assize and Nisi Prius*, Oyer and Terminer and General Gaol Delivery, for the several counties where such Courts are to be holden.

Section 45 provides, that any Queen's Counsel may be an associate Justice for the despatch of civil or criminal business at any county or on any circuit in Upper Canada, and any such person shall and may be and act as a Judge of such courts, in the absence of any Judge of the superior Courts of Common Law, as fully as if he were duly commissioned as one of Her Majesty's Judges of the said superior Courts of Common Law.

By the Common Law Procedure Act of 1856, Statutes of Canada, 19 Vic. ch. 43, sec. 318, the 20th sec. of 12 Vic. ch. 63, and the 43rd, 44th, and 45th sections of 18 Vic. ch. 92, were repealed; and by section 152 of the same Act it was provided that "Courts of Assize and Nisi Prius

of Oyer and Terminer and of General Gaol Delivery, shall be held in every County or Union of Counties in Upper Canada (except in that within which the city of Toronto is situate) in each and every year, in the vacations between Hilary and Easter Terms and between Trinity and Michaelmas Terms, with or without commissions as to the Governor of this Province shall seem best, and on such days as the Chief Justices and Judges of the superior Courts of Common Law in Upper Canada shall respectively name; and if Commissions are issued, then such Courts shall be presided over by the persons named in such Commissions; but if no such Commissions are issued, then the Courts of Assize and Nisi Prius shall be presided over by one of the Chief Justices or of the Judges of the said superior Courts of Common Law, or in their absence then by some one of Her Majesty's Counsel learned in the law and of the Upper Canada bar, who may be requested by any one of the said Chief Justices or Judges to attend for that purpose, or by some one Judge of a County Court who may be so requested; and the Courts of Oyer and Terminer and General Gaol Delivery shall be presided over by either of the said Chief Justices or Judges, or by any such of Her Majesty's Counsel or any such Judge of a County Court, each and every of whom shall be deemed to be of the quorum, together with any one or more of the persons who shall be named as associate Justices of the said Courts of Oyer and Terminer and General Gaol Delivery; and the said Chief Justices and Judges, and such of Her Majesty's Counsel as aforesaid, and such Judge of a County Court presiding at any Court of Assize, and Nisi Prius, shall and may possess and exercise the like powers and authorities as have been usually expressed and granted in Commissions issued for the holding of such Courts; and the said Chief Justices and Judges and such of Her Majesty's Counsel as aforesaid, and such Judge of a County Court presiding at any Court of Oyer and Terminer and General Goal Delivery, and the person or persons named as Associate Justices, shall and may possess

and exercise the like powers and authorities as have been usually expressed and granted in and by Commissions issued for holding such last mentioned Courts, and wherein such Chief Justices and Judges and Queen's Counsel and Judges of County Courts would have been named of the *Quorum*."

Provision is then made for the holding of these Courts three times a-year in the City of Toronto, and the times of holding the same are named, with the proviso that special commissions may issue for the trial of any offenders.

Sec. 153 makes provision similar to that contained in sec. 44 of 18 Vic. cap. 92, as to Associates, but limiting the number of such Associates to five for any one Court of Oyer and Terminer and General Gaol Delivery; and the Clerk of Assize is made *ex officio* one of the Associate Justices.

The Common Law Procedure Act of 1857, 20 Vic. ch. 57, sec. 30 (Canada) repealed secs. 152 and 153 of 19 Vic. ch. 43, and substituted a new section for it similar in terms, except that it provided that it should not be necessary to name any Associate Justices in any Commissions of Oyer and Terminer and General Gaol Delivery that might be issued, or that any Associate Justices should be nominated, or attend, or be present, at any Court of Oyer and Terminer and General Gaol Delivery to be held after the last day of Trinity Term, 1856. Then comes the usual proviso, that nothing therein contained shall restrict the Governor from issuing special commissions for the trial of any offender.

Those parts of the Consolidated Statute of Upper Canada, ch. 11, as amended by ch. 40, sec. 3, of the Statutes of Canada, 29–30 Vic. which were in force at the time of the trial of the indictment referred to, and which it is necessary to refer to, are as follows:—

Consol. Stat. U. C. ch. 11, sec. 1, (as amended by 29–30 Vic. ch. 40, sec. 3.) "The Courts of Assizes and Nisi Prius, and of Oyer and Terminer and General Gaol Delivery, shall be held in every county or union

of counties in Upper Canada in each and every year in the vacations between Hilary and Easter Terms, and between that period of the vacation after the twenty-first day of August and Michaelmas Terms, and in addition to the said two Courts to be held for the County of the City of Toronto and the County of York, there shall be held a third such Court in every year in each of the last two mentioned counties in the vacation between Michaelmas and Hilary Terms; and all such Courts shall be held, with or without commission, as to the Governor may seem best, and on such days as the Chief Justices and Judges of the Superior Courts of Common Law shall respectively name."

Sec. 2. "In case commissions be issued, such commissions shall always contain the names of the Chief Justices and Judges aforesaid, one of whom, if any one of them be present, shall preside in the said Courts respectively, and such commissions may also contain the names of any of the Judges of the County Courts, and of any of Her Majesty's Counsel learned in the Law of the Upper Canada Bar, one of whom shall preside in the absence of the Chief Justices and of all the other Judges of the said Superior Courts."

Sec. 3. "If no such commissions be issued, the said Courts shall be presided over by one of the Chief Justice, or of the Judges of the said Superior Courts, or in their absence, then by some one Judge of a County Court, or by some one of Her Majesty's Counsel learned in the Law, of the Upper Canada Bar, upon such Judge or Counsel being requested by any one of the said Chief Justices or Judges of such Superior Courts to attend for that purpose."

Sec. 4. "Each of the said Chief Justices and Judges and of such Judges of the County Court and of such Counsel learned in the Law, presiding at any Court of Assize and Nisi Prius, or of Oyer and Terminer and General Gaol Delivery, shall possess, exercise and enjoy all and every the like powers and authorities heretofore set forth and granted in commissions issued for holding all or any of the said Courts."

Sec. 5. "It shall not be necessary to name any associate Justices in any commissions of Oyer and Terminer and General Gaol Delivery, or that any Associate Justices should be nominated to, or attend, or be present at any Court of Oyer and Terminer and General Gaol Delivery."

Sec. 6. "The Governor may issue special commissions of Oyer and Terminer or of Gaol Delivery for the trial of offenders, whenever he deems it expedient."

The argument of the learned Counsel for the prisoner, as I understand it, is that it is necessary that the Governor, under the provision of the Statute already referred to, should decide, as an affirmative proposition, whether the Courts referred to shall be held with or without commission: that this decision should be made before the Courts are held, and should be made known by some instrument under the great seal; and that the caption to the indictment should shew how the Courts were held, whether under commission, or that the Governor had decided they should be held without commissions.

The Courts, as I understand the Statute, are not held by virtue of the commission, but by the provisions of the Act itself. By it the Courts shall be held in the vacations there specified, and on such days as the Judges shall name.

The issuing of the commission does not make the least difference as to how or when these Courts fixed by the Judges under the law are to be held, or who or which of the Judges of the Superior Courts of Common Law are to preside over them. If the Courts were presided over by a County Judge or Queen's Counsel, it might perhaps be necessary to state in the caption of the indictment how the Court was held, whether under the authority of a commission or not. If under the authority of a commission, then of course only the County Judge and Queen's Counsel named therein could, in the absence of the Judges of the Superior Courts referred to, hold such Courts, and it might be necessary to shew how that was, as well as in the event of the Court being held without commission, for the pre-

siding Judge or Queen's Counsel in that case could only hold them on the request of one of the Judges of the Superior Courts, which it might be necessary to shew was done. But in any event, if the Courts could be held at all they were presided over by the Judge who the Statute requires should hold them, and who derives his authority from the Statute.

The argument of the prisoner's counsel being that the Crown can only act by matter of record, under seal, I take it for granted that "if it seemed best" to the Governor that the Courts should be held under commission, the only evidence of such conclusion which could properly be given would be the commission itself. In the absence of such commission it seems to me that he most effectually decided that "it was best" that no commission should issue to hold the Courts. The authority to hold the Court in the first section of the Statute then arises at once, and and becomes complete under the third section, which says "If no such commission be issued, the said Courts shall be presided over by one of the Chief Justices," &c.

In my opinion the recital in the caption of the indictment, that at a general session of Oyer and Terminer and General Gaol Delivery, for the county named, holden before the Chief Justice of the Court of Common Pleas, a Justice of Our Lady the Queen, duly assigned and under and by virtue of the Statute in that behalf duly authorized and empowered to enquire, &c., sufficiently shows a holding of the Courts without commission. If there had been a commission, it would and ought to have been recited, and there being no commission the Court, as I have already said, in my judgment was properly held without it.

The record itself states that the Judge was under and by virtue of the Statute in that behalf duly authorized to inquire by the oaths, &c., of lawful men; and at such Court of Oyer and Terminer and Gaol delivery it was presented that the prisoner did murder one Thomas D'Arcy McGee. It is further recited that at the same session of Oyer and Terminer and General Gaol Delivery, held before

the said Judge (naming him), came the said prisoner in custody of the Sheriff and pleaded not guilty to the said indictment, on which issue being joined, "therefore let a jury thereupon immediately come before" the said Judge (naming him), of good and lawful men by whom the truth of the matter may be better known, and who are, &c., to recognize, &c., because as well, &c. Then the return of the panel is recited.

But, suppose there is any defect or omission in setting out in the caption in a proper manner the authority of the Judge or Court to take the particular proceedings necessary in this matter, I still think, if this Court, having knowledge of its own practice and proceedings, and of those of other Superior Courts under our own Statutes, are satisfied the Courts were duly held, we may reject the caption altogether, under the provision of sec. 52, of Consol. Stat. C. ch. 99, which declares that "In making up the record of any conviction or acquittal on any indictment, it shall be sufficient to copy the indictment with the plea pleaded thereto, without any formal caption or heading, and the statement of the arraignment, and the proceedings subsequent thereto, shall be entered of record in the same manner as before the passing of the Act," (subject to alterations to be made by any rule or rules of Court.)

On this first question, I cannot say that I have any doubt that the Court in question was properly held under the authority of the Statute, whether a commission issued or not. If it issued, the Statute gave authority to the Judge who presided to hold the Courts of Oyer and Terminer and General Gaol Delivery referred to; and if it did not issue, the Statute equally gave authority to the same Judge to hold the Court, and in my judgment it was equally shewn that it seemed best to the Governor that the Court should be held without commission.

The second ground of error is, that no jury process is awarded upon the said record, nor could such process be legally awarded by the said William Buell Richards, as such Chief Justice, inasmuch as, for the reason firstly above

assigned, he had no jurisdiction or authority to award such process as a Justice of Oyer and Terminer and General Gaol Delivery for the said County of Carleton.

By the Jury Act, Consol. Stat. U. C. ch. 31, sec. 59, "The Judges, Justices, and others to whom the holding of any sittings or sessions of Assize and Nisi Prius, Oyer and Terminer, Gaol Dēlivery, Sessions of the Peace, or County Court, by law belongs, or some one or more of such Judges, Justices or others, shall for that purpose issue precepts to the Sheriff or other proper officer or minister for the return of a competent number of Grand Jurors for cases criminal for such sittings or sessions, and of a competent number of Petit Jurors for the trial of such issues or other matters of fact, in cases criminal and civil, as it may be competent to such Petit Juries to try at such sittings or sessions according to law."

Section 60.—"The several precepts for the return of panels of Grand and Petit Jurors for any sittings or sessions of Assize and Nisi Prius, Oyer and Terminer, Gaol Delivery, Sessions of the Peace, or County Court, shall be issued to the Sheriff or other officer or minister to whom the return of such precept belongs, *as soon as conveniently may be after the Commission, or other day is known upon which the jurors to be returned upon such precepts are to be summoned to attend*, and where such day is fixed by law, then as soon as conveniently may be after the close of the last preceding sittings or sessions of the like Court."

Section 63 continues the same power and authority to the Superior Courts of Common Law at Toronto, and all Courts of Oyer and Terminer and General Gaol Delivery in Upper Canada, as theretofore, "in issuing any writ or precept, or in making any award or order orally or otherwise for the return of a jury for the trial of any issue before any of such Courts, respectively, or for amending or enlarging the panel of jurors returned for the trial of any such issue, and the return of any such writ, precept, award or order, shall be made in the manner heretofore used and accustomed in such Courts," &c.

Section 72. "For the trial of issues in cases whether criminal or civil, which come on in course for trial at any sittings or sessions of Assize and Nisi Prius, Oyer and Terminer, Gaol Delivery, Sessions of the Peace, or County Court, it shall not be necessary to sue out any writ of *Venire Facias Juratores* or other jury process, but the award of such process by the Court, and the entry of such award where necessary on the roll, together with the return of a panel of jurors upon the general precept issued for such sittings or sessions, and the trial of such issues respectively by a jury taken from such general panel, in the manner herein provided, shall be sufficient, and shall be as valid and effectual in law as if the *Venire Facias Juratores*, or other process, had been actually and regularly sued out in each case, and the names of the jurors had been regularly returned upon such jury process."

Section 74, among other things, provides that nothing in the Act "shall alter, abridge or affect any power or authority, which any Court or Judge hath when this Act takes effect, or any practice or form in regard to trials by jury, jury process, juries or jurors, except in those cases only where any such power or authority, practice or form, is repealed or altered, or is inconsistent with any of the provisions hereof."

As to the recital in the caption of the indictment not stating in express words that the Judge therein named was assigned to deliver the gaol of the county of the prisoners therein, I have already remarked that under the Statute no caption is necessary; and if it had simply stated that at the sitting of the Court of Oyer and Terminer and General Gaol Delivery of our Lady the Queen, held before the Judge of the Superior Court therein named, on the day named, it was presented in manner and form sa followeth, and then continued as in the record sent up, it seems to me, under the Statute, that would be all that is necessary.

The early Statute which I have referred to, of Upper Canada, 7 Wm. IV., ch. 1, sec. 8, says commissions of Oyer and Terminer and General Gaol Delivery *shall* be

issued twice a year into the several districts of the Province; and the same provision being continued down to the latest enactments on the subject, contained in the Consolidated Statutes of Upper Canada as amended, which I have extracted, all shew that in these general sittings of the Court of Oyer and Terminer the General Gaol Delivery sat with it. In practice, I believe, from a very early period of our judicial history, as far as Upper Canada is concerned, Judges and Justices of Oyer and Terminer and General Gaol Delivery were named in the same commission, which conferred all the powers for holding both these Courts On directing search in the Crown office, these commissions in that form seem to have been universally used in Upper Canada since 1818, for the general sittings of those Courts, and we have seen a precept filed in the Crown office, reciting a commission of a similar character, of an earlier date.

The Commission of Assize and Nisi Prius was a separate one, all the Courts in fact being held under these two commissions.

It further appears that the form of caption and record in the criminal cases in use in the Crown office here, where these records in criminal cases have always been made up in this country, has been that used in the present case.

In Practice, I should infer that in this country the course pursued is similar to that in England. A precept signed by the Judges, who are always named in both commissions, goes to the Sheriff, to return a general panel of jurors, and that precept is returned into Court on the first day of the Assizes with the panel, and from the names contained in that panel all the juries, both on the civil and criminal side of the Court, are taken; and as the criminal Court always possesses the powers of Oyer and Terminer and General Gaol Delivery, the jury process awarded in that Court is entered on the rolls, "therefore let a jury thereupon immediately come."

In *Hawk.* P. C. Book 2, ch. 41, sec. 1, it is said that

Justices of Gaol Delivery may have a panel returned without precept, for before their coming they always make a general precept, and therefore they need not make any other precept for the return of a jury, but their bare award "that the jury shall come" is sufficient, because there are enough for that purpose supposed to be present in Court, whom the Sheriff may return immediately. See also *Hale* P. C. Vol. II. pp. 28, 260, 261, 263, 410; *Chitty's* Crim. Law, Vol. I. p. 506; *Peter Cook's* Case, 13 State Trials, 326; 2 *Hawk.* P. C., Book 2, ch. 5, secs. 21, 32.

The case of *Rex* v. *Royce*, referred to, (4 Burr. 2085), shews that it is not necessary to set out the Commission of Gaol Delivery in full.

The form used in making up this record, as far as the end of the judgment, is somewhat similar to that in the appendix to the fourth volume of Blackstone's Commentaries, though it there appears that the sittings of Oyer and Terminer and Gaol Delivery were at different times, yet the Commission of Oyer and Terminer seems to be fully recited, and then the indictment found before the justices of that Court is afterwards, on a day named, at the delivery of the gaol of the county, holden before the Judges named, and their fellows, (Justices of the King assigned to deliver his gaol aforesaid of the prisoners therein), being by the proper hands delivered in Court in due form of law to be determined; and afterwards, at the same delivery of the gaol of the said county, and before the same Justices above named, and others their fellows aforesaid, came the said prisoner in custody, &c.

We must, I presume, take judicial cognizance of the powers of a Court of General Gaol Delivery, and wherever it is recited in a record that anything was done at such a Court, if we find that such Courts have power to do the thing so recited to be done, we must hold it to be rightly done. I do not see how we can, against the record and the facts there stated, hold that a Court of General Gaol Delivery was not held as it purports; and if so held, then

their power to direct the jury to come, stated on the record, no doubt existed.

On the whole, I am of opinion that under our own Statutes in relation to the holding of these Courts, the Jury Act, the provision of the Statute respecting the caption of indictments, and the practice which has so long prevailed here, the record sufficiently sets forth the power of the Judge to hold the Court and award the jury process excepted to. And as far as I have been able to explore the present state of the law in England on the subject, I am not prepared to say that, independent of many of the provisions of our own Statutes, the proceedings objected to are not regular and sufficiently shewn to be legal and properly authorised, as set forth in the record.

As to the third and fourth ground of error—that the presiding Judge erroneously decided that the prisoner's challenge of the juror Sparks for cause should not be allowed, and erroneously refused his peremptory challenge of the juror Hodgins, because his peremptory challenges of twenty had been exhausted.

In *Sir William Parkyns'* case, 13 Howell's State Trials, p. 74, when Thomas Taylor's name was called, the defendant said "I challenge him, he is the King's servant." The next juror was then called, and when Leonard Hancock's name was called, he said "I except against him, he is the King's servant." He enquired (p. 75), "How many have I challenged?" *Clerk of Arraigns*—"Twenty-five." *Parkyns*—"But there are two that I gave reason for as the King's servants." *Cl. of Ar.*—"You may speak to my Lord about it." *Lord Chief Justice Holt*, addressing the prisoner—"You have challenged two, and have assigned the cause of your challenge, that is, Hancock and another, and the reason of your challenge is, because they are the King's servants. I am to acquaint you, that is no cause of challenge; but, however, the King's Counsel do not intend to insist upon it, if there are enough besides. They are willing to go on with the panel; and I speak this because I would not have it go for a precedent. * *

However, they will not stand with you, if there be enough to serve."

On the trial of *Jeremiah Brandreth* for high treason in 1817 (reported in 32 State Trials), before Chief Baron Richards, with Mr. Justice (afterwards Chief Justice) Dallas, Mr. Justice Abbott, afterwards Lord Tenterden, and Mr. Justice Holroyd, all eminent Judges, Sir Samuel Shepherd was Attorney General, and Sir Robert Gifford Solicitor General. At p. 774 the Attorney General said, in argument, "I apprehend the right of peremptory challenge must be exercised first. * * * I put it to your Lordships that that which I state most positively has never been questioned, and on reading the State Trials you will find that that which appears to have been always the practice is also founded on the principle, that the absolutely peremptory challenges must be made first, to leave those remaining upon the panel, about whose capacity to serve (when I say capacity to serve, I mean in consequence of any objection), questions may arise, to be made out by evidence on the part either of the prisoner or of the Crown."

The Chief Baron in giving his opinion said, "The prisoner is to declare his resolution first. It certainly is so in practice, about which, with the very small experience I have had, I can say I have no doubt, but others of the Court have had very large experience upon the subject, and I conceive it to be clear that it is according to the practice of the Courts, that the prisoner should first declare his resolution as to challenging. I think it is so upon principle also; he has his peremptory challenges, and then the rest of the jury lie in common between him and the Crown. Mr. Justice Holroyd said, "When a juror is called and presented to the Court, the first thing is to ascertain whether he is a juror or not. The next thing to be enquired into is, whether either party has cause of challenge or not: I mean, after it is ascertained that he is a freeholder, and has those qualifications without which he cannot be sworn. The first step therefore, is to ascertain whether he is to be sworn or not. * * * If neither party challenge

him, and it is shewn that he is a person qualified to be a juror, the only requisite step that remains to be done is, that he shall be sworn."

I may use language in relation to this matter similar to that used by Baron Bramwell in *Mansell* v. *The Queen* (8 E. & B. 111). "Very little weight is to be attached to the opinion I formed at the Assizes; for the subject was new to me." I followed the practice which I had always understood to prevail in this country in relation to challenges, and the reasoning of the Attorney-General in Brandreth's case suggested itself to my mind. The only authority then at hand to refer to was *Archbold's* Pleading and Evidence in Criminal Cases, and in the last edition, the 16th, at page 149, I found it thus laid down:—"And the defendant, in treason or felony, may for cause shewn object to all or any of the jurors called, after exhausting his peremptory challenges of thirty-five or twenty."

When we look at the very eminent Judges who presided in Brandreth's case, and see that the late Lord Denman, then Mr. Denman, was one of the defendant's counsel, it seems strange that the broad language used by the Attorney-General should not have been objected to, if his views were not then received as correct. It is true the discussion did not necessarily involve the question of exhausting the peremptory challenges first, but if the broad language used was considered open to objection, I should have thought some notice would have been taken of it.

In the head-note of the case of *The Queen* v. *Geach*, indicted for forgery, in 1840, (9 C. & P. 499), it is stated, "In a case of felony, after a prisoner has challenged twenty of the jurors peremptorily, he may still examine any other of the jurors (who are subsequently called) as to their qualification." The defendant in that case was an attorney, and he seems to have exhausted his peremptory challenges first, and then wished to know if he could examine the juror as to his qualification. He probably had the idea that while he had peremptory challenges he must use them.

I have no doubt but that at any time before a juror is sworn, he may be examined as to his qualification, whether before or after his peremptory challenges are exhausted, in order to ascertain whether he is a person qualified to be a juror. In the English cases to which we were referred in argument, I did not meet with any in which the challenge for favor was discussed to any extent before the peremptory challenges were exhausted. In one of the cases—*Cook's* case,—it was objected that the juror had made use of language similar to that set up as a cause of challenge against Sparks. Yet in that case, as the prisoner was not in a position to prove the alleged cause of challenge, and the juror was not bound to answer as to it on his *voir dire*, the challenge for cause was not in any way tried or proceeded with.

I have already quoted what was said in *Sir William Parkyns'* case, as to the objection that two of the jurors were the King's servants; and in *Rex* v. *Stone* (6 T. R. 527, the juror was objected to as being ill-described, being described as of Grafton Street, when there were several streets of that name. On that being over-ruled he was challenged peremptorily.

There are several American cases where the jurors were challenged for favor, and on the challenge being decided against the prisoner, he was allowed to challenge peremptorily immediately after.

I find, however, the doctrine expressly laid down by Lord Coke, in his first Institute, 158 *a*, in reference to when the challenge is to be taken. After going over different heads numerically, such as "*First*, he that hath divers challenges must take them all at once, and the law so requireth indifferent trials, as divers challenges are not accounted double." Then, after stating other heads, he comes to, "*Sixthly*, if a man in case of treason or felony challenge for cause, and he be tried indifferent, yet he may challenge him peremptorily." And the conclusion is, "After one hath taken a challenge to the polle, he cannot challenge the array." There is no reference to

authority for the doctrine laid down *sixthly* by Lord Coke, but it is adopted and reasons given for it by Blackstone in the fourth volume of his Commentaries, the passage being quoted hereafter from the judgment of Judge Beardsley, in the case of *Bodine*.

It is also stated to the same effect in *Comyn's* Digest Challenge, ch. 1, with a reference to *Co. Lit.* 158 *a;* and in *Hawkins*, P. C. Book 2, ch. 43, sec. 10; *Hale*, P. C.; *Foster; Joy* on Confession and Challenges 186, quoting *Blackstone's* Commentaries; *Chitty's* Crim. Law, p. 545. *Dickinson*, Q. S. 189, quotes the language of Sir William Blackstone, in his commentaries, on the subject.

Most of the American authorities where the matter is referred to affirm the same doctrine.

Hooker v. *State of Ohio*, (4 Hammond 348) decides that a prisoner may challenge for cause before his peremptory challenges are exhausted—quoting 4 *Blackstone's* Commentaries, 366; *Williams* on Justices, 189; 4 *Harg.* State Trials, 738, 739, 740, 750; *Chitty* Criminal Law, vol i. p. 545; *Bac.* Ab., Jurors, E. 11; *Burn's* Justice, 4, 2; *Hawk*, P. C., 2, ch. 43, section 10; *Co. Lit.* 158. *Commonwealth* v. *Knapp*, (9 Pick 496), is referred to as authority.

In *Carnal* v. *The People* (1 Parker's Criminal Reports, of the State of New York, 272,) much of the law as to the order of the challenges is referred to, and the right of the prisoner to challenge peremptorily after a challenge for cause decided against him, is expressly recognized.

The cases in the 1st and 4th volumes of Denio's reports of the Supreme Court of the State of New York shews that the peremptory challenges were used after challenges for cause had been decided against the prisoner, and so do most of the other American cases referred to, except in two cases in Massachusetts, *Commonwealth* v. *Webster*, (5 *Cushing*, 295,) and *Commonwealth* v. *Rodgers* (7 *Metcalf*, 500). These cases however, were decided under a peculiar statute, and underit the courts held that the prisoner must make his peremptory challenges before the jurors are interrogated by the Court as to their bias.

I have found in *Brunker's* Digest, p. 615, reference to an Irish case which decides that a prisoner may challenge a juror peremptorily after a challenge to the juror *propter affectum* has been found against the prisoner by the triers.

After this array of authorities sustaining the views of Lord Coke, and the approval they have received from the other great legal writers and eminent compilers of the law, I think it must be conceded I was wrong in deciding as I did at the Assizes that the challenge by the prisoner of the juror Sparks could nor then be received and tried as a challenge for cause at the time he took it. If I had said that the challenge for cause could be more conveniently disposed of after the peremptory challenges had been exhausted, perhaps under the views expressed by some of the Judges in *Mansell's* case, the ruling might have been sustained; but even then the advantage suggested by Blackstone, of the prisoner availing himself of the peremptory challenges to exclude a juror who might be unfriendly, on account of the challenge for cause having been made, could not be attained.

Looking, then, at the way in which the question of the over-ruling of the prisoner's challenge to the juror Sparks is put on the record, I think the writ of error is the proper way of bringing the matter before the Court. The cause of challenge and the decision thereon are reduced to writting, and the judgment of the Court is upon a matter not involving any question of fact, and they are all on the record.

The decision of the Court having been adverse to the prisoner, two courses were open to him. He could either decline challenging the juror peremptorily, and he would then have been sworn on the jury, or he could challenge him peremptorily, and exclude him from the jury. If he had gone upon the jury, and been sworn thereon, then the view we take of the law is that it would have been a mis-trial, and on the matter being brought up on a writ of error the court would have directed a *venire de novo.*

It is suggested that the statement that, "in deference to

the said judgment, the said challenge is taken and treated by the said Patrick James Whelan and by the said Attorney General as a peremptory challenge for and on behalf of the said Patrick James Whelan, and the said Jonathan Sparks is thereupon not sworn upon the said jury," shews that Sparks was not challenged *peremptorily* by the prisoner.

It is not suggested that he was challenged by the Crown, or ordered to stand aside at the instance of the Crown. The challenge for cause was not tried, and the Court had decided that it could not then be received as a challenge for cause, but only as a peremptory challenge, and it was accordingly taken and treated as a peremptory challenge, and thereupon Sparks was not sworn on the jury. Surely he was not sworn because both the prisoner and the Crown treated the challenge as a peremptory one; and that in fact was the only way in which the juror could have been kept off the jury.

It seems to me that the natural conclusion from the statement—the Court decided against the prisoner's right then to challenge for cause, but held it might be good as a peremptory challenge, and if his peremptory challenges of twenty were exhausted that was to be considered as one of them—is, that as the Court would not accept it as a challenge for cause, the prisoner did what in fact the judgment of the Court compelled him to do, if he wished to exclude Sparks from the jury—viz., peremptorily challenged him.

The prisoner himself, in the statement put by him on the record in regard to the juror Hodgins, puts his interpretation on the decision of the Court relative to Sparks: namely, the challenge of Sparks for cause "was not allowed by the said Court, nor was the said challenge for cause tried nor submitted to triers by the said Court, but the said Patrick J. Whelan was required to challenge the said Jonathan Sparks peremptorily, if he desired to challenge the said Jonatnan Sparks as one of the jurors of the said jury, and that the said challenge should be considered as a peremptory challenge, and not as a challenge

for cause; and the said challenge for cause was accordingly *taken* and treated as a peremptory challenge, and the said Jonathan Sparks was not thereupon sworn upon the said jury."

Is this anything more or less than saying: "The Court having decided that if I wished to challenge Sparks, and exclude him from the jury, I must do so peremptorily, and that this challenge should be considered as a challenge for cause, it was accordingly so taken and treated." By whom was it so taken and treaed when the prisoner put that statement on the record? If not by himself, who else? His treating it so was the only mode by which the juror could properly be excluded from the box, and if he had stated it differently, that it was not so taken and received by the prisoner, then it would be for the Crown prosecutor to consider whether he would have recalled Sparks as improperly excluded from the jury. The whole statement shews to my mind very clearly that Sparks was excluded from the jury as peremptorily challenged by the prisoner, and that he was so excluded, not because he did not wish to have the challenge for cause disposed of, but, that being decided against him, the only way in which he could exclude the juror was by his challenging peremptorily.

Then we are to view the matter in this way:—The Court having erroneously refused to allow the prisoner to challenge Sparks for cause, in order to exclude him from the jury the prisoner was obliged to challenge him peremptoriy.

Abbott, C. J., in *The King* v. *Edmonds* (4 B. & Al. 473), says: "The disallowing of a challenge is a ground not for a new trial, but for what is strictly and technically a *venire de novo*. The party complaining thereof applies to the Court, not for the exercise of the sound and legal discretion of the Judges, but for the benefit of an imperative rule of law, and the improper granting or the improper refusing of a challenge is alike the foundation for a writ of Error." At page 475 he further observes, "It was said the defendants had a right to make their challenge,

and to have it tried, whether they could sustain in by proof or not. To which I answer, if they had that right and would insist upon it, they should have pursued it rightly and regularly. Not having done so, their ground and their intended proof must be open to examination. And if upon examination it appears that they could not have sustained their challenge, they are not entitled to a delay of justice, in order to give them an opportunity of making an experiment in due form, which, in the opinion of the Court, would be deficient in substance."

I take it that the doctrine laid down in the case from which I have just cited Lord Tenterden's words, applicable to this subject, is, that when the matter is on the record in the form of error the matter is to be decided as a strictly legal proposition, and no considerations of the effect which our decision may have on the parties to the record will be permitted to be taken into consideration by us to mould our judgment by the exercise of discretion, though of course we must endeavour, when we consider what the effect of our decision may be, to arrive at a correct conclusion as to the law of the case, and when we have arrived at that conclusion we are bound to declare it, whatever effect it may have upon others.

In the case of the juryman, in a note to 12 East. 231, after a trial was over it was discovered that Robert Curry, who was one of the jurors, had answered to the name of Joseph Curry, and was sworn by that name. Robert was qualified to serve, and was summoned. The Judge considered it would have only been a ground of challenge, and after judgment could not be assigned as error. The Judges were unanimously of opinion that it was no ground of objection, even if a writ of error were brought.

In *The King* v. *Sutton* (8 B. & C. 419), when it was objected that one of the special jury was an alien, which defendant did not know until after the trial, the Court refused to grant a new trial. Lord Tenterden said, "I am not aware that a new trial has ever been granted on the

ground that a juror was liable to be challenged, if the party had an opportunity of making his challenge."

In *Dovey* v. *Hobson* (6 Taunt. 460), a person not summoned on the jury, was sworn on it. After the case had been gone through, Gibbs, C. J., proposed to discharge the jury, but Vaughan, Sergeant, for the plaintiff, insisted on keeping them, and had a verdict; Best, Sergeant, not opposing, but giving no consent. Gibbs, C. J., said, "Here the objection was taken, and the plaintiff's Counsel apprised at the time that he took the verdict at the peril of not being able to hold it, and therefore we think that the eleven jurymen being well summoned, and a twelfth not being well summoned, and a verdict taken by those twelve, and the objection being pointed out at the time, the Court, in the exercise of their discretion to grant a new trial or not, ought to set aside this verdict, and that there ought to be a rule absolute for a *venire de novo*."

In *Brunskill* v. *Giles* (9 Bing. 13), the objection was made at the trial that the jury had been convened by the partner of the attorney for the plaintiff, but not being able to support it in evidence, the cause proceeded, and a verdict was found for the plaintiff. On application for a *venire de novo*, Park, J., said: "There is not the shadow of a pretence for this application. The cause proceeded at the trial because no ground of challenge had been established. Instead of withdrawing, the counsel for the defendant chose to address the jury, and take his chance of a verdict: he cannot be allowed to defeat it without even an affidavit of surprise."

In *The Queen* v. *Sullivan, et al.*, (8 A. & E. 831), defendants were indicted for a conspiracy. On the trial before a special jury, one of the jurymen, after being sworn, stated he had been one of the grand jury who found the bill. He continued in the box. The counsel for the prosecution offered to consent that the juror should withdraw and the trial proceed with eleven; but, the defendants not consenting, the case went on and the defendants were con-

victed. Platt, for the defendants, moved on the ground of a mis-trial. It did not appear if the defendants knew whether the jurymen had been of the grand jury or not. Lord Denman, in giving judgment, said, "The defendants here did not challenge; and when the objection was pointed out, and it was proposed that the juror should withdraw, they declined assenting to that course and preferred to stand upon the strict law." The rule was refused.

In *The Mayor, &c., of Carmarthen* v. *Evans et al.* (10 M. W. 274), challenges to the array and to the polls were over-ruled. The defendants' Counsel declined to appear and try the cause. The challenges were not put upon the record. Plaintiffs recovered a verdict. Defendants moved in arrest of judgment, or to set aside the verdict on the ground of the validity of the challenges. The Court held, the challenges not having been made in a proper manner, they would not make the rule absolute. Lord Abinger said: "If the omission had arisen from the mistake of counsel or the defendant had been misled by the dictum of the Judge at Nisi Prius, we might have granted a new trial and changed the venue; yet that could only have been done on an affidavit of merits, which are not suggested here, and payment of the costs."

In *Doe Ashburnan* v. *Michael* (16 Q. B. 621), tried before Parke, B., a person of a different name from the juror was called, but he lived in the same place and followed the same business,—a wine merchant, High street, Brecon. The juror hearing his place of residence, business, &c., so called, and also having been summoned on another special jury, went into the box and was sworn. The case went on; the jury retired; when they returned into Court the names of the jury were called over; then the mistake was discovered. The defendants objected to the verdict. Parke, B., offered to try the case over again by a proper jury, but the plaintiffs insisted on the verdict being received, and a verdict was given for the plaintiff. The juryman objected to had been originally drawn on the jury, and his

name had been struck out at the instance of the plaintiff. There was a motion to set aside the verdict, and for a *venire de novo.* In giving judgment Patteson, J., said, "The defect having been discovered and insisted on before the verdict was given, we think it is one that cannot be passed over, and that we must make the rule absolute for a *venire de novo.* If it had been discovered after the verdict the question would have been a very different one, and many considerations would have entered into the decision of the question, which might have induced us not to disturb the verdict. But clearly there has been a mis-trial here; and we have no other alternative than to grant, not a new trial, but a *venire de novo.*"

In *Ham* v. *Lasher* (referred to, in 24 U. C. R. at p. 533., note *a*,) a juror peculiarly obnoxious to the plaintiff had got on the jury by answering to the name of another. The plaintiff mentioned this fact to the Court on the second day of the trial, but took no steps to have the jury discharged, or refuse to proceed further with the trial, but elected to go on. The Court refused to interfere on that ground, holding that if a party to a suit, aware of a fatal objection to the constitution of the jury, elect to go on and take his chance of a verdict, he cannot afterwards be heard urging the objection.

In *Widder* v. *The Buffalo and Lake Huron Railway Company* (24 U. C. R. 534), the following observations are made:—"Independently of authority the reason of the thing would naturally suggest that a plaintiff clearly aware of a fatal objection to a jury about to try his cause, should not, after electing to take his chance of a verdict, be heard urging an objection which he was quite willing to waive had the verdict been in his favor."

When deciding on strict questions of law we must dispose of this case precisely as we would a civil case. Suppose a defendant in a civil action to challenge a juror for cause, and the Judge erroneously decides against him; suppose the challenge appears on the record, and after that has been done the party making the challenge chooses to

exclude that juror from the jury by one of the three peremptory challenges allowed him by law ; he then goes on with the trial and a verdict is rendered against him. Would we hold that he could fall back on his challenge and claim to have a *venire de novo*?

Put an extreme case: Suppose he had been forced to use his peremptory challenges to exclude from the jury persons who were clearly incompetent for the causes taken by him to serve on the jury, would the Court order a *venire de novo* ? Would it be prudent, in fact, for him to rest his case, if trying to get rid of the verdict, on the errors which, as far as the jurors objected to, would seem to be cured by their not being on the jury who tried the cause ? Ought he not rather to apply to the Court for a new trial, and shew how he had been prejudiced by the course he was induced to take from the mistake of his counsel in not standing on his legal rights under the demurrer, or from having been misled by the dictum of the Judge at Nisi Prius ? If we would only grant relief on an affidavit of merits in that case, then I fail to see how we can, on this bald proposition of law, here decide the question for the prisoner. If he had stood by his demurrer he might urge that the jury were not *omni exceptione majores*, but the defects are purged by the exclusion of the jurors objected to from the jury who tried the cause.

The case of *Lithgow* v. *The Commonwealth* (2 Virginia Cases 297,) goes to the full extent of sustaining the prisoner's case, and even further. In that judgment the Court argue that the improper refusal of a challenge may have an unfavourable effect on the party, to prevent him from renewing his objections when another defective juror is brought forward—that making challenges which are overruled might also influence the mind of the jurors afterwards to be called, and in that way the prisoner might be prejudiced; and the Court goes to the full length of deciding that, whether the prisoner has exhausted his peremptory challenges or not, the fact that his challenge has been illegally rejected, and he has been compelled to use any

of his peremptory challenges to be relieved from the obnoxious juryman, is sufficient ground for reversing the conviction.

Dowdy v. *The Commonwealth*, (9 Grattan's Virginia Reports, 727), is to the same effect: namely, that if a prisoner's objections to the juror be illegally over-ruled it is a good ground for error, though the prisoner may have peremptorily challenged the juror. They refer to *Lithgow's* case as authority.

In *McGowan* v. *The State*, (9 Yerger, 184, decided in 1836), where the prisoner did not exhaust his peremptory challenges, and he elected a jury *omni exceptione majores*, having peremptory challenges unexhausted, the Court held it did not constitute error to reverse the judgment.

In *Carroll* v. *The State*, in the Supreme Court of Tennessee, in 1852 (3 Humphreys, 315), where the challenge for cause was wrongly decided, and the prisoner challenged the juror peremptorily, as he had not exhausted his peremptory challenges, it was held no ground for reversing the verdict. 9 Yerger 184, above cited, was referred to.

In *The People* v. *Bodine*, (1 Denio's reports of cases in the Supreme Court of the State of New York, at page 300), in the argument, it is said: "All the jurors who were found indifferent by the triers, were challenged peremptorily, except Cook and McColgan. As to those so challenged and excluded, no question can arise. * * The prisoner was not prejudiced by any error in respect to the challenges of these jurors for cause, unless in getting rid of them she lost peremptory challenges which she needed; but it is shewn that, after the jury were empannelled, she had peremptory challenges remaining. We also insist that *as to the two jurors who finally sat on the trial*, it must be considered that the prisoner approved of and accepted them; for although she had seven peremptory challenges left, she forbore to use them to exclude these jurors."

In giving judgment Beardsley J. said, at page 309. "The prisoner challenged but thirteen jurors peremptorily, although she might have challenged twenty (2 R. S. 734, § 9).

"As she might thus have excluded all who were challenged for favor, and not set aside by the triers, it is argued that the omission to do so precludes all exception on the part of the prisoner to what was done by the Judge, however erroneous it may have been. The law, it is said, gives the right to make peremptory challenges in order to correct errors of this description, and the prisoner, having refused or neglected to avail herself of this remedy, is thereby estopped from resorting to any other mode of redress. This argument is specious, but I think not sound. Every person on trial is entitled to a fair and impartial jury, and to secure this object, challenges *for cause* are allowed, and are unlimited. If adequate cause is shown, the juror, in every instance, should be set aside. This is the right of the party challenging, and is in no case to be granted as a favor. Such is plainly the law where peremptory challenges do not exist, and where they do the rule is the same.

"Peremptory challenges are allowed to a prisoner on trial to be made or omitted according to his judgment, or his pleasure, will or caprice. No reason is ever given or required for the manner in which the right is exercised by the party. Blackstone says they are allowed "on two reasons: 1. As every one must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike; 2, Because, upon challenges for cause shewn, if the reasons assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke resentment; to prevent all ill consequences from which the prisoner is still at liberty, if he pleases, peremptorily to set him aside," (4 *Black.* Com. 353. See also 1 *Chit.* Crim. Law 534; 1 Inst. 156 *b*). "In no case is the prisoner bound to resort to

his right to make peremptory challenges. It is armour which he may wear or decline at his pleasure. It is for his own exclusive consideration and decision, and the Court has no right to interfere with his determination. Nor should the prisoner's refusal to make use of her peremptory challenges, as she might have done, preclude her from raising objections to what was done by the Judge; and if, in truth, errors were committed, I do not see that it is less our duty to correct them, than it would have been if the prisoner had fully exhausted her peremptory challenges. The use or disuse of that right, I regard as a fact wholly immaterial to the question now before the Court, and one which cannot rightfully exert the slightest influence upon the decision to be made."

In the case of *Freeman* v. *The People*, decided in the same Court of the State of New York, in which judgment was given by the same learned Judge, reported in 4 Denio, p. 20, the head note as to one of the points decided is, "When a juror is set aside by a peremptory challenge, the party on whose behalf it was made cannot on error insist upon an erroneous ruling of the Court upon the previous trial of a challenge of the same juror for cause." At page 31, the learned Judge uses the following language: "Several persons drawn as jurors were, in the first place, challenged for principal cause by the counsel for the prisoner, but the Court held that these challenges were not sustained by the evidence adduced in their support. Challenges for favor were then interposed; but the jurors were found by the triers to be indifferent. Various exceptions were taken by the prisoner's counsel to points made and decided in disposing of these challenges; and, although the several jurors then challenged were ultimately excluded by the peremptory challenges of the prisoner, it is now urged that these exceptions are still open to examination and review in this Court. I think otherwise. The prisoner had the power and the right to use his peremptory challenges as he pleased, and the Court cannot judicially know for what cause or with what design he resorted to them—*The People* v. *Bodine* (1 Denio 310).

"He was free to use or not use them as he thought proper; but having resorted to them they must be followed out to all their legitimate consequences. Had he omitted to make peremptory challenges, his exceptions growing out of the various challenges for cause would have been regularly here for revision. But he chose by his own voluntary act to exclude these jurors, and thus virtually, and, as I think, effectually blotted out all such errors, if any, as had previously occurred in regard to them. But the case of the juror Beach stands on other grounds. He was first challenged, as it is said, for principal cause, which, after evidence had been given, was overruled by the Court. He was then challenged for favor, but the triers found him to be indifferent. No peremptory challenge was made, and he served as one of the jury. As to this juror, every exception taken by the prisoner's counsel is now here for examination and review."

In *Stewart* v. *The State* (8 English, 13 Arkansas, Reports, at p. 742), the Court, in giving judgment on the effect of a prisoner resorting to peremptory challenge after his challenges for cause had been improperly overruled by the Judge who tried the cause, said:—"The plaintiff in error complains that he was compelled by the decisions of the Court in question to exhaust three of his peremptory challenges. The record here does not shew that the prisoner had exhausted all his peremptory challenges in the empanelling of the jury, and it seems to have been held, in the case of *McGowan* v. *The State* (9 Yerger, 184), under similar circumstances, that the judgment would not be reversed for an error in deciding a juror who had been challenged for cause to be competent if the party afterwards challenged him peremptorily. But in the case of *The People* v. *Bodine*, before cited (1 Denio 281), it did appear that the prisoner had challenged but thirteen jurors peremptorily, although she might have challenged twenty, and it was argued that she was not bound to have excepted (*a*) a juror erroneously decided to be competent upon her challenge for cause, but

(*a*) *Sic—Quærē*, accepted.

might and ought to have corrected the error by availing herself of the peremptory challenges allowed her by law for that purpose. The opinion of the Court was that in no case is the prisoner bound to resort to his right to make peremptory challenges, but he may exercise it according to his judgment or caprice. 'It is for his own exclusive consideration and decision, and the Court has no right to interfere with his determination.' The question was to be considered as if she had no right of peremptory challenge, and as if the acceptance of the juror was forced upon her in consequence of the erroneous decision, and then she would stand upon the legal exception. It follows from this reasoning, that if the party chooses to challenge the juror peremptorily when he is not obliged to do so, he, by the exercise of his own will or caprice, has undertaken to correct the supposed error of the Court, and waived the benefit of the previous exception. Because, if the decision was right, the party excepting could not have been injured by it, if it was wrong, he had the benefit of his exception; but if at the time in doubt whether it be right or wrong, and he prefers to take the chances for an acquittal, and so elects to rid himself of the obnoxious juror by a peremptory challenge, there is no reason for holding, that he can avail himself on error of the exception thus abandoned. And so the Supreme Court of New York decided in the subsequent case of *Freeman* v. *The People.* Referring to the case in 1 Denio, 310 Judge Beardsley, who delivered the opinion of the Court in both cases, said: 'The prisoner was free to use his peremptory challenges as he thought proper, but having resorted to them, they must be followed out to all their legitimate consequences. Had he omitted to make peremptory challenges his exceptions growing out of the varions challenges for cause would have been regularly here for revision. But he chose by his own voluntary act to exclude these jurors, and thus virtually, and, as I think, effectually, wiped out all such errors, if any, as had previously occurred in regard to them.' Such, we think, is the law applicable to the case now under consideration."

I have endeavoured to look upon the case and the matters before us,as I have already intimated, as purely legal questions, without embarrassing them with considerations of the grave consequence of our decision on the fate of the prisoner. I think it is our duty to do this, and, therefore, looking at it in that light, I am of opinion that the prisoner, by peremptorily challenging the juror Sparks, has put out of our consideration the question whether the points raised in his case were properly decided or not. The jury, as far as he is concerned, is pure, and whether he ought to have been excluded or not in my judgment is not now before us. He has been excluded by the act of the prisoner himself. "Whether that arose through the mistake of counsel or from being misled by the dictum of the Judges at Nisi Prius," to use the language of Lord Abinger, in the case in 10 M. & W., at p. 278, it does not appear to me to be now of any consequence. If, indeed, it could be shewn that the prisoner had been prejudiced in fact by the proceeding, and we were called upon to decide a matter of discretion, and not of mere law, then we might possibly relieve him.

After giving the subject the best consideration I can bestow upon it, and carefully reading and considering the cases to which we have been referred bearing on the subject, I have arrived at the conclusion that the able judgments of the Superior Court of the State of New York, reported in the first and fourth volumes of Denio's Reports, which I have abstracted at some length, and the case of *Stewart* v. *The State*, in 8 English, 720, based upon and following the cases in Denio's Reports, which I have abstracted at even greater length, and repeating in it some of the passages of the former judgments, lay down the principles which should govern this case :—that the prisoner, by peremptorily challenging the juror Sparks, has put aside the question of the erroneous decision of the Judge as to the right of the prisoner then to challenge him for the cause assigned; and that he has not any *locus standi* to assign error for that decision, or for the rejection of the peremptory challenge of the juror Hodgins.

It may be convenient here to refer to a practice which is said to prevail in England, noted in *Joy* on Challenges, at p. 149, and *Dickinson's* Quarter Sessions, p. 502, 5th edition, 1841, by Sergeant Talfourd, is cited as laying it down:—"But even in misdemeanours, it is usual in England for the officer, upon application to him, to abstain from calling any reasonable number of names, objected to either by the prosecutor or the defendant, taking care that enough should be left to form a jury: and this practice has often been sanctioned by the Court."

In *Marsh* v. *Coppock*, (9 C. & P. 480), where the Court decided it was no ground for challenge that the juror was a tenant of a nobleman, whose interest in the Borough was supposed to be affected, nevertheless the juror was withdrawn by the plaintiff's counsel. I refer to these matters, as well as to the case in the state trials, to shew with what liberality parties concerned in the administration of justice in England allow jurors who are objected to to remain off a jury, when it is not likely by doing so the ends of justice will be interfered with (*a*).

Judgment affirmed.

At the conclusion of these judgments,

Harman, for the plaintiff in error, applied for leave to appeal to the Court of Error and Appeal, under Consol. Stat. U. C. ch. 13, sec. 29. He intimated also that the plaintiff would apply to the Attorney General for his fiat for a writ of error to remove the case into that Court.

The plaintiff in error was remanded until Thursday, the 24th December, one of the days appointed for giving

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(*a*) In *Gray* v. *The Queen*, in the House of Lords (11 Cl. & Fin. 470), Baron Parke says: "The practice" (of peremptory challenge) "prevails equally, so far as my experience goes, in misdemeanours, and in all civil cases; no one ever heard of any impediment being interposed to the defendant or plaintiff in actions, in modern times, objecting to any number of jurymen without cause, and they are always withdrawn; yet in actions there is unquestionably no right of peremptory challenge."

judgments after Michaelmas Term; and the following order was made:—

IN THE COURT OF QUEEN'S BENCH.

The twenty-first day of December, in the year of our Lord one thousand eight hundred and sixty-eight.

PATRICK JAMES WHELAN,
Plaintiff in Error,
v.
THE QUEEN,
Defendant in Error.

Patrick James Whelan, the plaintiff in error, being brought here into Court by the Sheriff of the County of York, by virtue of a rule of this Court, upon hearing Counsel on both sides, it is considered and adjudged by the Court here that the judgment given against the said Patrick James Whelan at the Session of Gaol Delivery holden at Ottawa, in and for the County of Carleton, on the second day of September last, upon an indictment against him for murder and felony, is good and sufficient in law, and it is thereupon ordered that the said judgment be affirmed. And the plaintiff in error, Patrick James Whelan, being brought here into Court in custody of the Sheriff of the County of York by virtue of a rule of this Court, is remanded to the same custody, charged with the matters in the said rule mentioned. And it is further ordered that the Sheriff do bring the said Patrick James Whelan before this Court on Tuesday next.

(Signed) C ROBINSON,
For the Queen.
(Signed) SAMUEL B. HARMAN,
For the Prisoner.
(Signed) ROBERT G. DALTON,
C. C. & P.

On the 24th of December, the plaintiff in error was brought into Court.

J. H. Cameron, Q. C., for the plaintiff in error, stated that the Attorney General had signed a fiat for a writ of

error. The Court granted the leave to appeal applied for on the 21st. He moved also for a writ of *Habeas Corpus* to bring the prisoner before the Court of Error and Appeal on the 31st December, which was granted.

C. Robinson, Q. C., for the Crown, said there appeared to be difficulties both as to the jurisdiction of the Court of Appeal, and as to the proper mode of bringing the case before that Court, which could be discussed at the proper time.

A rule was drawn up, giving the plaintiff leave to appeal, and the following certificate was signed by the Chief Justice, pursuant to the "Rules under the Criminal Appeal Act," which rules are printed in 8 C. P. 370, 16 U. C. R. 159:—

IN THE QUEEN'S BENCH.

Sittings after Michaelmas Term, 32 Victoria.

The twenty-fourth day of December, in the year of our Lord one thousand eight hundred and sixty-eight.

THE QUEEN
v.
PATRICK JAMES WHELAN.

The defendant, Patrick James Whelan, was convicted of murder at the last Court of Oyer and Terminer and General Gaol Delivery for the County of Carleton, and is now under sentence of death thereupon.

Upon a writ of error issued at the suit of the defendant, the conviction has been confirmed by the judgment of the Court of Queen's Bench for Upper Canada.

That Court, upon the motion of the defendant, has this day allowed an appeal against their judgment to the Court of Error and Appeal, pursuant to the Consolidated Statutes of Upper Canada, cap. 13, sec. 29.

Certified pursuant to the terms of the Rules passed under the Criminal Appeal Act, in Michaelmas Term, 22nd Victoria.

(Signed) WILLIAM B. RICHARDS,
Chief Justice.

The following order was made:—

IN THE QUEEN'S BENCH.

The twenty-fourth day of December, in the year of our Lord one thousand eight hundred and sixty-eight.

PATRICK JAMES WHELAN,
Plaintiff in Error,
v.
THE QUEEN,
Defendant in Error.

Patrick James Whelan, the plaintiff in error, being brought here into Court in custody of the Sheriff of the County of York by virtue of a rule of this Court, it is ordered by the Court here that the said Patrick James Whelan, the plaintiff in error, be remanded to the custody of the said Sheriff to await the further order of this Court. And it is further ordered that the said Sheriff of the County of York, here in Court, do receive the said Patrick James Whelan, the plaintiff in error, and detain the said Patrick James Whelan to await the further order of this Court, or till he be otherwise delivered in due course of law.

On motion of Mr. ROBINSON,
Counsel for the Crown.

By the Court.

(Signed) ROBERT G. DALTON,
C. C. & P.